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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GENE MYERS, Guardian Ad Litem, *Petitioner*

v.

SHAWN KATHLEEN LEWIS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the fundamental constitutional right to privacy extends to an abortion where the woman's physician has determined, in the exercise of his best medical judgment, that the abortion is not necessary for the well-being of the patient?

2. Whether, given the state's strong interests in preserving unborn human life, in preferring childbirth over abortion, and in protecting the right of the husband to the care, custody, and companionship of his child, a trial court may properly enjoin a woman from obtaining an abortion which is not medically necessary for her well-being?

3. Whether the holding in *Roe v. Wade*, employed to extend constitutional protection to abortion, should be reconsidered in light of subsequent legal scholarship and unforeseen pernicious effects of that opinion?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Gene Myers, Guardian Ad Litem for Unborn Child Lewis, the father of Unborn Child Lewis, Carlton James Lewis, and the respondent Shawn Kathleen Lewis.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
I. WHETHER THE MICHIGAN COURT OF APPEALS ERRED IN HOLDING THAT THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO PRIVACY EXTENDS TO AN ABORTION WHERE THE WOMAN'S PHYSICIAN HAS DETERMINED, IN THE EXERCISE OF HIS BEST MEDICAL JUDGMENT, THAT THE ABORTION IS NOT NECESSARY FOR THE WELL-BEING OF THE PATIENT?	7
A. *ROE V.WADE*, *DOE V. BOLTON*, AND THEIR PROGENY RECOGNIZED CONSTITUTIONAL PROTECTION, AS A "FUNDAMENTAL" RIGHT, ONLY FOR ABORTIONS MEDICALLY "NECESSARY" FOR THE "WELL-BEING OF THE PATIENT"	7
1. *ROE V. WADE* HELD THAT THE ABORTION RIGHT IS NOT ABSOLUTE, AND	

THAT IT IS "INHERENTLY, AND PRIMARILY, A MEDICAL DECISION, AND BASIC RESPONSIBILITY FOR IT MUST REST WITH THE [WOMAN'S] PHYSICIAN" 8

2. *DOE V. BOLTON* DEFINED THE CONCEPT OF THE MOTHER'S "HEALTH" BROADLY BUT LIMITED CONSTITUTIONAL PROTECTION TO CASES WHERE "MEDICAL JUDGMENT" HAD DECIDED THAT AN ABORTION WAS APPROPRIATE 10

3. SUBSEQUENT ABORTION DECISIONS OF THIS COURT HAVE REAFFIRMED THE REQUIREMENT OF *ROE* AND *BOLTON* THAT ABORTION DECISIONS BE BASED ON A MEDICAL JUDGMENT OF NECESSITY FOR THE WELL-BEING OF THE MOTHER 12

II. WHETHER THE MICHIGAN COURT OF APPEALS ERRED IN HOLDING THAT, DESPITE THE STATE'S STRONG INTERESTS IN PRESERVING UNBORN HUMAN LIFE, IN PREFERRING CHILDBIRTH OVER ABORTION, AND IN PROTECTING THE RIGHT OF THE HUSBAND TO THE CARE, CUSTODY, AND COMPANIONSHIP OF HIS CHILD, A TRIAL COURT MAY NOT PROPERLY ENJOIN A WOMAN FROM OBTAINING AN ABORTION WHICH IS NOT MEDICALLY NECESSARY FOR HER WELL-BEING? 13

A. THE UNBORN CHILD HAS RIGHTS AND INTERESTS RECOGNIZED IN BOTH *ROE* AND GENERAL JURISPRUDENCE 13

B. THE APPROPRIATE LEGAL ANALYSIS IN THE PRESENT CASE IS THE SUBSTANTIVE DUE PROCESS ANALYSIS EMPLOYED BY THIS COURT IN ITS ABORTION CASES 16

C. UNDER THE APPROPRIATE LEGAL ANALYSIS, THE ACTION OF THE TRIAL COURT IN ENJOINING THE ABORTION WAS NOT CONSTITUTIONALLY INFIRM 18

III. WHETHER THIS COURT SHOULD DECIDE THAT THE HOLDING IN *ROE V. WADE*, EMPLOYED TO EXTEND CONSTITUTIONAL PROTECTION TO ABORTION, SHOULD BE RECONSIDERED IN LIGHT OF SUBSEQUENT LEGAL SCHOLARSHIP AND UNFORESEEN, PERNICIOUS EFFECTS OF THAT OPINION? 19

CONCLUSION 26

APPENDIX 1a

TABLE OF AUTHORITIES

United States Supreme Court Cases: *Page(s)*

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 12, 16, 20, 24

Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) 22

Boys Market, Inc. v. Retail Clerks, 498 U.S. 235 (1970) 21

Burnet v. Colorado Oil and Gas Co., 285 U.S. 393 (1932) 25

Carey v. Population Services International, 431 U.S. 678 (1977) 6, 12

Colautti v. Franklin, 439 U.S. 379 (1978) 12

Doe v. Bolton, 410 U.S. 179 (1973) 2, 6, 7, 8, 10-12, 19

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 20

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 20

Glidden Co. v. Zdanok, 370 U.S. 64 (1962) 20

Harris v. McRae, 448 U.S. 297 (1980) 7, 15

Honig v. Doe, 108 S.Ct. 592 (1988) 2

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 20

Maher v. Roe, 432 U.S. 464 (1977) 7, 14-17

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) 21, 24

Monnell v. Dep't of Social Servs., 436 U.S. 658 (1978) .. 24

Planned Parenthood Association of Kansas City v. Ashcroft, 462 U.S. 476 (1983) 16

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 2, 5, 23

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

Simopoulos v. Virginia, 462 U.S. 506 (1983)..... 16, 20

Thornburgh v. American College of Obstetricians and Gynecologists, 106 S.Ct. 2169 (1986)..... 13, 23

Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) 24-25

Vazquez v. Hillery, 474 U.S. 254 (1986)..... 21

Michigan Cases:

O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971). 14

People v. Bricker, 389 Mich. 524, 208 N.W.2d 172 (1973) 14

Toth v. Goree, 65 Mich. App. 296, 237 N.W.2d 297 (1976) 23

Other Cases:

American Academy of Pediatrics v. Heckler, 561 F.Supp. 395 (D.D.C. 1983)..... 24

Bouvia v. Superior Court, 179 Cal.App.3d 1127, 225 Cal.Rptr. 297 (Cal.Ct.App. 1986) 24

Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972) ... 23

Conn v. Conn, No. 73C01-8806-DR-127, slip op. (Shelby County [Ind.] Cir. Ct. June 27, 1988), *rev'd* 525 N.E.2d 612 (Ind. Ct. App. 1988), *aff'd and opinion of app. ct. adopted by order*, No. 73S01-8807-CV-631 (Ind. July 15, 1988), *petition for cert. filed*, (U.S. Aug. 24, 1988) (No. 88-347) 10

In the Matter of Unborn Child H., No. 84C01-8804-HP-185, slip op. (Vigo County [Ind.] Cir. Ct., Apr. 8, 1988), *appeal pending sub nom Doe v. Smith*, No.84A01-8804-CV-00112 (Ind. Ct. App. 1988) 10

In re the Treatment and Care of Infant Doe, No. GU-8204-004A, slip op. at 2 (Monroe County [Ind.] Cir. Ct., Apr. 12, 1983), Petition for Writ of Mandamus and

Prohibition, *denied sub nom. State of Indiana ex rel Infant Doe v. Monroe Circuit Court*, No. 482S 140 (Ind. Apr. 14, 1983), *cert. denied* 104 S.Ct. 394 (1983), *reprinted in* 2 Issues in Law & Medicine 77 (1986)..... 23-24

Turpin v. Sortini, 31 Cal.3d 220, 643 P.2d 954, 182 Cal.Rptr. 337 (1982)..... 24

Michigan Statutes:

Mich. Comp. Laws Ann. § 600.2045 (West 1968) 14

1987 Mich. Pub. Acts 59 15

Miscellaneous Authorities:

A. Bickel, *The Morality of Consent* (1975) 22

A. Cox, *The Role of the Supreme Court in American Government* (1976)..... 22

Editors' Preface, 77 Mich. L. Rev. (no number) (1979).. 22

J. Ely, *The Wages of Crying Wolf:A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973)..... 21

Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sp.Ct. Rev. 159 22

Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 Mich. L. Rev. 1724 (1979) 22

Pfeiffer, "Abandoning Error: Self-Correction by the Supreme Court," *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* (Horan, Grant & Cunningham eds. 1987)..... 25-26

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Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. Rev. 231 21-25

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v.

SHAWN KATHLEEN LEWIS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Petitioner Gene Myers, Guardian Ad Litem for Unborn Child Lewis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Michigan Court of Appeals, entered in *Lewis v. Lewis and Myers* on September 15, 1988.

OPINIONS BELOW

The Order of the Michigan Supreme Court (not reported) refusing to review the opinion of the Michigan Court of Appeals is reprinted in the appendix hereto, p. 1a, *infra.*

The opinion of the Michigan Court of Appeals (not reported) is reprinted in the appendix hereto, p. 3a, *infra.*

The Stipulated Findings of Fact and Conclusions of Law of the Genessee County Circuit Court is reprinted in the appendix hereto, p. 7a, *infra.*

JURISDICTION

Carlton James Lewis, father of Unborn Child Lewis (the Father herein) initiated this action in the Genesee County [Mich.] Circuit Court, invoking the equitable and statutory injunctive powers of the court to consider his rights and interests in the unborn child against those of Shawn Kathleen Lewis (the Mother herein) in aborting the child and to determine, based on the relevant weight of those rights and interests, whether the Mother should be allowed to obtain an abortion or be enjoined. The Father argued before the circuit court that *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), did not preclude such an action. A temporary restraining order was issued by the trial court.

The Mother promptly asserted an absolute constitutional right to an abortion, whether or not there was a medical judgment of necessity for her well-being, relying on *Roe*. Plaintiff's Brief in Support of Motion to Dissolve Ex-parte Preliminary Injunction at 5. Upon a hearing, the trial court issued a preliminary injunction, barring the Mother from aborting the child, on September 6, 1988. Appendix, pp. 18a-19a. Gene Myers was appointed Guardian Ad Litem. Appendix, p. 19a.

On the Mother's appeal, the Michigan Court of Appeals, on September 15, 1988, entered a judgment ordering the preliminary injunction dissolved. Appendix, p. 3a. On September 22, 1988, the Michigan Supreme Court issued an order refusing to grant leave to appeal. Appendix, p. 1a. No rehearing was sought.

The Jurisdiction of this Court to review the judgment of the Michigan Court of Appeals is invoked under 28 U.S.C. § 1257(3) based on the assertion of the Respondent of rights under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States . . . are citizens of the United States . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This case was commenced by the filing of a Complaint for Divorce by the Mother, on January 20, 1988. "From approximately late May [, 1988,] through mid July, [1988,] the parties engaged in sexual intercourse, unprotected, although at previous times, the parties had used contraceptives." Defendant's Response to Plaintiff's Brief in Support of Motion to Dissolve Ex-parte Preliminary Injunction at vi.

On or about August 8, 1988, the Mother informed her husband, the Father, that she was seven or eight weeks pregnant and intended to have an abortion. The Mother does not dispute that her husband is the father of the child.

On August 9, 1988, on the Father's motion, the Genesee County [Michigan] Circuit Court issued a Temporary Restraining Order, ex parte, prohibiting the Mother from obtaining an abortion.

The constitutional issue herein was raised in the circuit court when counsel for the Mother claimed that there were medical indications for the abortion only to concede later that such a claim could not be documented, and, rather, the woman's attending physician had made the medical judgment that this abortion was not medically necessary for the well-being of the Mother. Appendix, p. 8a. *See also* Appendix, p. 20a, (trial court exhibit of statement by physician). The trial court had declared

that he would dissolve the injunction if evidence of medical necessity could be produced, noting that *Roe* required the medical judgment of the woman's attending physician that the abortion was necessary for her well-being. Appendix, p. 8a. The Mother asserted an absolute right to an abortion even where her physician had declared it not necessary for her well-being. Brief in Support of Motion to Dissolve Ex-Parte Preliminary Injunction at 5.

On September 6, 1988, the Circuit Court conducted a hearing and issued a statement of facts disclosing that the abortion sought was not medically necessary for the well-being of the Mother, because her attending physician indicated that the abortion decision "was specifically a social decision as opposed to a medical decision to terminate the pregnancy." Appendix, p. 8a, 20a. The circuit court did not reach the issue of paternal rights in the abortion context, because it decided the case on the basis that *Roe* did not extend constitutional protection to the abortion proposed herein. Appendix, p. 16a.[1]

On September 6, 1988, therefore, the Circuit Court issued a Preliminary Injunction prohibiting Mother from having an abortion and certified the Order as a "Final Order For Purposes of Appeal There Being No Just Cause For Delay." The Court also appointed attorney Gene Myers as Guardian Ad Litem for the Unborn Child during the pendency of this matter.

The constitutional issue of the scope of the abortion privacy right was presented to the Michigan Court of Appeals in the Guardian Ad Litem's Brief before that Court. The issues stated therein were as follows:

> 1. Does the constitutional right to privacy extend to an abortion where the woman's physician has not deter-

[1] The trial court distinguished *Roe* from the instant case on the basis of factors which are not argued herein. The asserted distinction between *Roe* and this case is the lack of medical necessity, as determined by the Mother's attending physician, for the abortion herein. Thus, *Roe* does not extend constitutional protection to the abortion proposed herein, which is the basis upon which this Court should uphold the injunction.

mined, in the exercise of his best medical judgment, that the abortion is necessary for the well-being of the patient?

2. In light of the state's strong interest in preserving unborn life, in preferring childbirth over abortion, and in protecting the right of the husband to the care, custody, and companionship of his child, may a trial court properly enjoin a non-medically indicated abortion?

That Court held, in a one sentence opinion, on September 15, 1988, that the injunction was ordered dissolved as violative of the Mother's constitutional right to an abortion as declared in *Roe* and *Danforth*. Appendix, p. 3a.

On September 15, 1988, the Michigan Supreme Court granted appeliants' motion for immediate consideration of their application for leave to appeal and ordered any further briefing to be submitted by 5:00 p.m. on September 20, 1988. The constitutional issues were raised in virtually identical language to that employed in the Court of Appeals in the Guardian Ad Litem's Brief before that court.

On September 22, 1988, the Michigan Supreme Court refused to review the Court of Appeals decision but extended its stay until Monday, September 26, 1988 at 5:00 p.m.

Thus, the federal constitutional issues, under the Fourteenth Amendment, have been raised in this case from its inception. With the final decision of the highest state court now issued, this case is ripe for consideration of the important constitutional issues raised herein.[2]

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[2] On Monday, September 26, 1988, this Court denied the Guardian Ad Litem's Application for a Stay Pending Certiorari review. The Guardian Ad Litem has received no notice that an abortion of Unborn Child Lewis has occurred, but, if it has, this case is clearly within the exception to the mootness doctrine for matters "capable of repetition yet evading review," as that doctrine is employed in abortion cases. *Cf. Roe*, 410 U.S. at 125; *Doe v. Bolton*, 410 U.S. 179, 187 (1973); *Honig v. Doe*, 108 S.Ct. 592, 609 (1988) (Scalia, J., concurring) (abortion jurisprudence "differ[s] . . . in dispensing with the same-party requirement). Moreover, the case at bar was timely

(Footnote continued)

REASONS FOR GRANTING THE WRIT

This Petition should be granted because the Michigan Court of Appeals erred in ordering the injunction prohibiting the abortion dissolved, based on its incorrect interpretation of *Roe v. Wade* and its progeny. This erroneous interpretation is evident in the discussion below of the issues raised in this appeal.

The argument may be succinctly summarized. The Mother and Father had sexual relations during an attempted period of marital reconciliation, from which she is now in her first trimester of pregnancy. She consulted with her personal physician who advised her that the abortion she sought was not medically necessary for her well-being. The Father sought an injunction to prevent her from aborting their child which he won from the trial court.

The Guardian defends the trial court decision on the basis that the Mother has no "fundamental" constitutional right to an abortion where her physician has determined the abortion sought is not medically necessary for her well-being. This Court has declared, "[T]he abortion decision *necessarily* involves a *medical judgment*." *Carey v. Population Services International*, 431 U.S. 678, 699 n.25 (1977) (citing *Roe*, 410 U.S. at 164) (emphasis added). The only evidence adduced in the trial court is contrary to this requirement. Rather, the Mother asserts her absolute right to an abortion on demand, which was explicitly rejected by this Court. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 189 (1973).

Therefore, as the Mother has no fundamental right to this abortion, on the facts of this case, the state need not show a compelling interest, but only that it has a constitutionally

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Footnote 2 continued

brought before this Court on an Application for Stay. But for the action of this Court in denying the Application, the case could have been heard without any consideration of mootness. Finally, the Mother has conceded that this case is within the exception to the mootness doctrine, if an abortion should occur, in her Response to Petitioner's Application for a "Stay" Pending Petition for Certiorari to the Michigan Supreme Court, at 3-4 n.2.

permissible purpose and that its action is rationally related to that purpose. The state has legitimate interests in protecting the life of the unborn, *Roe*, 410 U.S. at 159, 163, and in preferring childbirth over abortion. *Maher v. Roe*, 432 U.S. 464, 474 (1977); *Harris v. McRae*, 448 U.S. 297, 314 (1980). The injunction herein was rationally related to the permissible state purpose of furthering these interests. Therefore, the trial court's action in enjoining this abortion was constitutionally permissible and required to protect the interests of the unborn child.[3]

I. WHETHER THE MICHIGAN COURT OF APPEALS ERRED IN HOLDING THAT THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO PRIVACY EXTENDS TO AN ABORTION WHERE THE WOMAN'S PHYSICIAN HAS DETERMINED, IN THE EXERCISE OF HIS BEST MEDICAL JUDGMENT, THAT THE ABORTION IS NOT NECESSARY FOR THE WELL-BEING OF THE PATIENT?

The Michigan Court of Appeals has held, on the basis of *Roe* and the subsequent abortion cases of this Court, that a woman has a fundamental right to an abortion, in her first trimester, even where her attending physician has consulted with his patient and determined that the abortion sought by the Mother is not medically necessary for her well-being. This was not the holding of *Roe* and the subsequent abortion cases of this Court.

A. *ROE V. WADE, DOE V. BOLTON*, AND THEIR PROGENY RECOGNIZED CONSTITUTIONAL PROTECTION, AS A "FUNDAMENTAL" RIGHT, ONLY FOR ABORTIONS MEDICALLY "NECESSARY" FOR THE "WELL-BEING OF THE PATIENT."

In 1973, this Court recognized federal constitutional protection, as a "fundamental" right, for abortions medically neces-

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[3] The Guardian Ad Litem for the Unborn Child in the case at bar, Attorney Gene Myers, has determined, pursuant to the responsibilities entrusted to him by the Circuit Court for the County of Genesee, that the best interests of Unborn Child Lewis would be served if he or she were carried to term and not aborted.

sary for the well-being of the mother in two companion cases: *Roe v. Wade* and *Doe v. Bolton*. In both cases, as well as in their progeny, this Court has consistently recognized the necessary role of a physician and his medical judgment in determining whether an abortion is medically appropriate. Only in cases where an abortion is medically indicated to protect the health of the woman does a woman have a fundamental right to an abortion which requires special heightened constitutional scrutiny by the courts.

1. *ROE V. WADE* HELD THAT THE ABORTION RIGHT IS NOT ABSOLUTE, AND THAT IT IS "INHERENTLY, AND PRIMARILY, A MEDICAL DECISION, AND BASIC RESPONSIBILITY FOR IT MUST REST WITH THE [WOMAN'S] PHYSICIAN."[1]

The right to abortion is not absolute. This Court in *Roe* expressly and emphatically rejected the assertion of certain *amici* that a woman had a right to do with her body as she pleased. The Court declared:

> The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. [citations omitted]
>
> We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

410 U.S. at 154.

In *Roe*, this Court repeatedly emphasized the essential role of medical judgment in the abortion decision. After listing factors that might lead a woman to desire an abortion, this

[1] 410 U.S. at 166.

Court declared: "All these are factors the woman and her *responsible physician* necessarily will consider in consultation." *Id.* at 153. (emphasis added).

The *Roe* Court reiterated the necessity of medical judgment in the decision: "[F]or the period of pregnancy prior to [the end of first trimester], the *attending physician, in consultation* with his patient, is free to determine, without regulation by the state, that *in his medical judgment*, the pregnancy should be terminated." *Id.* at 163 (emphasis added).

In the summary of its holding, the *Roe* Court repeated the cruciality of the physician's medical judgment in the abortion decision: "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the *medical judgment* of the pregnant woman's *attending physician.*" *Id.* at 164 (emphasis added).

The *Roe* Court repeated its emphasis on the the centrality of a medical judgment in the abortion decision again in its summary:

> The decision vindicates the the *right of the the physician* to administer *medical treatment* according to his *professional judgment* up the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is *inherently, and primarily, a medical decision*, and *basic responsibility for it must rest with the physician. If an individual practioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.*

Id. at 166 (emphasis added).

Thus, it is plain from the *Roe* decision that a medical judgment by the woman's attending physician that an abortion is medically indicated for the protection of her health is a *sine qua non* of constitutional protection for the abortion decision. Absent such a judgment of medical necessity, as in the case at

bar, there is no constitutional right to an abortion for the Mother herein.[5]

2. *DOE V. BOLTON* DEFINED THE CONCEPT OF THE MOTHER'S "HEALTH" BROADLY BUT LIMITED CONSTITUTIONAL PROTECTION TO CASES WHERE "MEDICAL JUDGMENT" HAD DECIDED THAT AN ABORTION WAS APPROPRIATE.[6]

In the companion case to *Roe*, *Doe v. Bolton*, 410 U.S. 179, this Court reaffirmed the principle that the abortion right is not absolute: "a pregnant woman does not have an absolute constitutional right to have an abortion *on her demand.*" *Id.* at 189 (emphasis added).

Thus, abortion on demand was clearly not recognized by this Court as having constitutional protection. Rather, the right extends only to abortions which are medically necessary for the well-being of the mother in the sound medical judgment of the attending physician.

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[5] The class of abortions beyond the constitutional protection of *Roe* may be illustrated by judicially determined reasons asserted in recent "father's rights" cases. In one case, the trial court found the reasons for seeking an abortion included the desire not to be pregnant in the *summertime*, so as to look good in a bathing suit and not have an impaired summer social life, and not wanting to share the father with anyone, including their baby. *In the Matter of Unborn Child H*, No. 84C01-8804-HP-185, slip op. at 2 (Vigo County [Ind.] Cir. Ct., Apr. 8, 1988), *appeal pending sub nom Doe v. Smith*, No. 84A01-8804-CV-00112 (Ind. Ct. App. 1988).

In another "father's rights" case, now before this Court on a petition for certiorari, the trial court found that the mother was willing to carry the child to term if she could be sure her husband, against whom she had filed a marriage dissolution action, could not gain custody of the child when born. She said she would carry the child to term if her husband would agree to put the child up for adoption by a third party, foreign to the marriage. *Conn v. Conn*, No. 73C01-8806-DR-127, slip op. at 4 (Shelby County [Ind.] Cir. Ct. June 27, 1988), *rev'd*, 525 N.E.2d 612 (Ind. Ct. App 1988), *aff'd and opinion of app. ct. adopted by order*, No. 73S01-8807-CV-631 (Ind. July 15, 1988), *petition for cert. filed*, (U.S. Aug. 23, 1988) (No. 88-347).

[6] 410 U.S. at 191-92.

This was made clear in this Court's upholding of a Georgia statute making it "a crime for a physician to perform an abortion except when . . . it is 'based upon his best clinical judgment that an abortion is necessary.' " *Id.* at 191 (citation omitted). The statute had been challenged on the basis that "necessary" was unconstitutionally vague. This Court construed the concept of necessary for the mother's health broadly, including "all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient." *Id.* at 192. Using this broad construction of the concept of health, the Court rejected the vagueness challenge. *Id.*

Although the *Bolton* Court defined broadly the concept of what is necessary for a woman's health, the Court did not reject the necessity of a medical judgment that an abortion must be medically indicated (even under the broad definition) in order to be constitutionally protected. This Court summarized the effect of the district court's decision, which it affirmed, as follows:

> The net result of the District Court's decision is that the abortion decision, so far as the physician is concerned, is made in the exercise of his professional, that is, his 'best clinical,' judgment in the light of *all* the attendant circumstances. He is not now restricted to the three situations originally specified. Instead he may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him.

Id. at 191 (emphasis in original). The *Bolton* Court noted that "[t]his allows the attending physician the room he needs to make his *best medical judgment*." *Id.* at 192 (emphasis added).

That this Court requires that the abortion decision be subject to the best medical judgment of the attending physician was further confirmed by the Court's discussion of the Georgia requirement that two physicians concur as to medical necessity. The Court declared: "The statute's emphasis, as has been repetitively noted, is on the *attending physician's 'best clinical*

judgment that an abortion is necessary.' That should be sufficient." *Id.* at 199 (emphasis added).

Chief Justice Burger in a concurrence to *Bolton* made it absolutely clear that the Court was mandating a physician's determination of medical necessity for the well-being of the mother and rejecting abortion on demand.

> [T]he vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand.

Id. at 208 (Burger, C.J., concurring).

3. SUBSEQUENT ABORTION DECISIONS OF THIS COURT HAVE REAFFIRMED THE REQUIREMENT OF *ROE* AND *BOLTON* THAT ABORTION DECISIONS BE BASED ON A MEDICAL JUDGMENT OF NECESSITY FOR THE WELL-BEING OF THE MOTHER.

Subsequent decisions of this Court have upheld the principle that constitutional protection, as a fundamental right, only extends to abortions medically necessary for the well-being of the mother. In *Carey v. Population Services International*, this Court declared that "the abortion decision necessarily involves a medical judgment." 431 U.S. at 699 n.25 (citing *Roe*, 410 U.S. 113).

Likewise, in *Colautti v. Franklin*, this Court recognized the centrality of the physician in making the abortion decision based on his medical evaluation and reasserted its earlier declaration that determinations of viability, for purposes of the *Roe* trimester framework, were "a matter of medical judgment . . . ." 439 U.S. 379, 388-94 (1978)(citation omitted). Also, in *Akron v. Akron Center for Reproductive Health*, the Court reaffirmed the central role of the physician in the decision-making process and the medical nature of the procedure. 462 U.S. 416, 426 (1983). In the most recent abortion case

decided by a majority of the Court, it was again recognized that a woman must make her decision "with the advice of her physician." *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169, 2178 (1986).

Thus, it is clear that only abortions medically necessary for the well-being of the mother have constitutional protection, as fundamental rights, requiring a state to demonstrate a compelling interest, under the holding of *Roe* and its progeny. The case at bar presents only a desire for an abortion on demand which is not constitutionally protected.

II. WHETHER THE MICHIGAN COURT OF APPEALS ERRED IN HOLDING THAT, DESPITE THE STATE'S STRONG INTERESTS IN PRESERVING UNBORN HUMAN LIFE, IN PREFERRING CHILDBIRTH OVER ABORTION, AND IN PROTECTING THE RIGHT OF THE HUSBAND TO THE CARE, CUSTODY, AND COMPANIONSHIP OF HIS CHILD, A TRIAL COURT MAY NOT PROPERLY ENJOIN A WOMAN FROM OBTAINING AN ABORTION WHICH IS NOT MEDICALLY NECESSARY FOR HER WELL-BEING?

A. THE UNBORN CHILD HAS RIGHTS AND INTERESTS RECOGNIZED IN BOTH *ROE* AND GENERAL JURISPRUDENCE.

Two interests relevant for consideration herein are: (1) the unborn child's interest in life and (2) the interest of the state in encouraging childbirth over abortion.[7]

The first interest was recognized in *Roe* itself, where this Court declared that the state has a legitimate interest in protecting the life of the unborn. 410 U.S. at 159, 163. The *Roe* Court declared this interest to be "important and legitimate"

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[7] The interest of the Father herein also bears consideration in a case where the mother's physician has determined that there is no medical necessity for the abortion to protect her well-being. This interest is not addressed in this petition.

throughout pregnancy. *Id.* at 162. This right is not limited or overridden by the health interests of the mother where, as in this case, the woman's physician has determined that her desired abortion is not medically necessary for her well-being.

The Michigan Supreme Court has also recognized this interest in protecting fetal life in the case of *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971). The *O'Neill* court expressly overruled an earlier decision holding that the unborn were not "persons" within the meaning of the wrongful death act. The court declared: "The fact of life is not to be denied. Neither is the wisdom of the public policy which regards unborn persons as being entitled to the protection of the law." *Id.* at 137, 188 N.W.2d at 788. The *O'Neill* court further declared that the statute authorizing guardians ad litem "for unborn persons," Mich. Comp. Laws Ann. § 600.2045 (West 196), "constitutes a legislative recognition of the *personhood* of the unborn." 385 Mich. at 137, 188 N.W.2d at 788 (emphasis in original).[8] In a powerful summation of its discussion of the personhood of the unborn, the Michigan Supreme Court declared:

> If property interests of unborn persons are protected by the law, how much more solicitous should the law be of the first unalienable right of man — the right to life itself?

Id. at 138, 188 N.W.2d at 788.

The Michigan Supreme Court also recognized, in *People v. Bricker*, 389 Mich. 524, 528, 208 N.W.2d 172, 175 (1973), that it is the public policy of the State of Michigan to proscribe abortion except to preserve the life of the mother. It acknowledged the effect of the federal supremacy clause in overriding this interest, but only where the abortion was "authorized by a pregnant woman's attending physician in the exercise of his medical judgment." *Id.*

The second interest, the state's interest in preferring childbirth over abortion, was recognized in *Maher v. Roe*, 432 U.S.

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[8] It is this same guardian ad litem statute which authorizes Gene Myers, as Guardian Ad Litem herein, to assert the rights of Unborn Child Lewis.

at 474, and *Harris v. McRae*, 448 U.S. at 314. These cases hold that the state may even implement this interest by preferring childbirth over abortion in its choice of funding for indigent women.

Michigan has made clear its public policy of preferring childbirth over abortion by the recent passage of a statute proscribing abortion funding. The statute declares:

> Section 109a. Notwithstanding any other provision of this Act, an abortion shall not be a service provided with public funds to a recipient of welfare benefits, whether through a program of medical assistance . . . or any other type of public aid or assistance program, unless the abortion is necessary to save the life of the mother. It is the public policy of this state to prohibit the appropriation of public funds for the purpose of providing an abortion to a person who receives welfare benefits unless the abortion is necessary to save the life of the mother.

1987 Mich. Pub. Acts 59 (amending Social Welfare Act of 1937, 1937 Mich. Pub. Acts 280). Thus, Michigan has adopted the public policy, recognized as legitimate in *Maher* and *McRae*, of preferring childbirth over abortion.

For purposes of Michigan law, where *Roe* and its federal constitutional principles do not impinge, the unborn are persons with a right to life. As *Roe* and its progeny do not sanction non-medically indicated abortions, the Unborn Child in this case is a person entitled to a right to life.

Thus, Michigan has recognized state interests in preferring childbirth over abortion and in protecting unborn human life, both interests found legitimate by *Roe* and its progeny. These legitimate interests are asserted herein in support of the injunction issued by the trial court.

B. THE APPROPRIATE LEGAL ANALYSIS IN THE PRESENT CASE IS THE SUBSTANTIVE DUE PROCESS ANALYSIS EMPLOYED BY THIS COURT IN ITS ABORTION CASES.

In *Roe*, this Court used a substantive due process analysis under the Fourteenth Amendment of the Constitution to determine that the right to abortion was constitutionally protected, where medically indicated and properly balanced against competing state interests. 410 U.S. at 153. This analysis has been consistently employed in subsequent abortion cases before the Court.

Under substantive due process analysis, where a state action unduly impinges on a fundamental right, the state must normally show a compelling state interest to justify such a burden and the action must be narrowly tailored to meet the state's compelling interest. *Maher v. Roe*, 432 U.S. at 473-74.

However, in the abortion context, the test has been modified due to the presence of the life of the unborn child. The state must meet a less strenuous "reasonably related" test rather than the "narrowly tailored" test. This formulation is evident in numerous cases.[9]

Furthermore, the "compelling interest" test is only applied where there is a *fundamental* right which is "unduly" burdened. *Maher*, 432 U.S. at 473-74. In *Maher*, the plaintiff argued that a woman had a fundamental right to government funding of her abortion and that denial of such funding was not justified by a compelling state interest.

The *Maher* Court held, however, that there was no fundamental right to government funding of abortion, and, there-

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[9] The test was first set forth in *Roe*, where the Court noted that, when the state has a compelling interest to "unduly" burden, *Maher*, 432 U.S. at 473-74, a fundamental right, the action of the state must be *reasonably related to* that interest. 410 U.S. at 163. *See also Akron*, 462 U.S. at 416, 431-32, 434, 438, 449 (1983); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476, 482, 485, 487, 488 n.12 (1983); *Simopoulos v. Virginia*, 462 U.S. 506, 511, 519 (1983).

fore, a "rationality" test was to be employed rather than a "compelling interest" test. In full, the applicable test in *Maher* was whether the state's action was " 'rationally related' to a 'constitutionally permissible' purpose." *Id.* at 478 (citations omitted).

The *Maher* Court held that, because the state "unquestionably ha[d] a 'strong and legitimate interest in encouraging normal childbirth,' an interest honored over centuries," *id.*, and, because the policy of funding childbirth but not abortion (for indigent women) rationally furthered that interest, the state action in *Maher* met the test of rationality and was constitutionally sound. *Id.*

In the present case, as set forth previously, there is no fundamental constitutional right to an abortion which is not medically necessary for the well-being of the Mother. Because the facts of this case establish that there is no medical indication for an abortion, the woman's interest in abortion is not a fundamental right.

Therefore, in the instant case, the state need not demonstrate a compelling interest for its action in enjoining effectuation of the Mother's nonfundamental abortion interest. If the Mother has any constitutionally protected interest in abortion, it is a nonfundamental liberty interest under the Fourteenth Amendment. The rational basis test is applicable.

The issue in the case at bar is whether the action of the state court, in enjoining an abortion not medically necessary for the well-being of the Mother, is rationally related to a constitutionally permissible purpose. As will be shown, this test is easily met, making the action of the trial court not constitutionally infirm.

As noted previously, the state has a permissible purpose in asserting the interest of the state in preferring childbirth over abortion and the interest in unborn human life. These are legitimate state purposes to which the action of the trial court in enjoining the abortion was rationally related.

C. UNDER THE APPROPRIATE LEGAL ANALYSIS, THE ACTION OF THE TRIAL COURT IN ENJOINING THE ABORTION WAS NOT CONSTITUTIONALLY INFIRM.

In the instant case, the action of the trial court in enjoining an abortion which was sought for reasons other than medical necessity to protect the health of the Mother (even employing the broad definition of health in *Bolton*) was rationally related to legitimate state purposes. Therefore, it was not an unconstitutional action.

In the trial court, the Mother asserted a constitutional right to abortion, free from any restriction based on the assertion of other interests. In order to be successful in her claim, she had an initial evidentiary burden to produce evidence sufficient to show that she was within the claimed constitutional protection. Indeed the trial court declared that the injunction would be dissolved if medical indications for an abortion could be established. In this case,the Mother's counsel initially claimed that there was a medical indication for the abortion. This initial claim proved to be groundless upon consultation with the client and her attending physician, and counsel was forced to concede to the trial court that there were no medical reasons for the abortion. On the contrary, the only evidence adduced in this case was that the Mother's physician said, "It is a social decision not a medical decision for a T.O.P. [termination of pregnancy] with this patient." Statement of John L. Stoker, D.O. *See* Appendix, p. 20a.

This concession by counsel for the Mother is the hinge on which this case turns. With the record closed by the Mother's request that the preliminary injunction be certified as a final order, the only evidence is the medical opinion of the Mother's attending physician, who, in his best clinical judgment, declared that this abortion is not medically necessary for the well-being of the Mother.

Thus, we have, in the instant case, an abortion being sought for no health reason whatsoever. Given the broad notion of

health employed in abortion jurisprudence, this abortion is among the most elective of elective abortions — a class of abortions not within the "fundamental right" protection of the United States Constitution. This case is about a woman seeking abortion on demand, which was rejected by this Court. *Bolton*, 410 U.S. at 189 ("[A] pregnant woman does not have an absolute right to an abortion on her demand.").

In such a context, the state court was constitutionally permitted to enjoin the abortion upon the assertion of legitimate competing interests, namely, (1) the interest of the state in preferring childbirth over abortion and (2) the interest of the Unborn Child in being carried to term and not aborted.

Was the action of the trial court rationally related to these legitimate state interest? Clearly, a constitutionally permissible action which specifically furthers these interests by preventing an abortion is rationally related to these state interests. It is obvious that the action directly effected the end sought.

In sum, the trial court acted correctly in enjoining the abortion sought by the Mother herein. Her desired abortion is outside the realm of constitutional protection and is therefore subject to state action to promote legitimate state purposes which are rationally related to those purposes, such as those asserted herein.

III. WHETHER THIS COURT SHOULD DECIDE THAT THE HOLDING IN *ROE V. WADE*, EMPLOYED TO EXTEND CONSTITUTIONAL PROTECTION TO ABORTION, SHOULD BE RECONSIDERED IN LIGHT OF SUBSEQUENT LEGAL SCHOLARSHIP AND UNFORESEEN, PERNICIOUS EFFECTS OF THAT OPINION?

If *Roe* does control the present case, giving the Mother a right to abortion on demand, even though her physician has determined that the abortion she seeks is not medically necessary for her well-being, then this Court should reconsider its holding in *Roe*. Such reconsideration would be appropriate

because of the unforeseen, pernicious effects of *Roe* and because subsequent legal scholarship has demonstrated that the foundations upon which the *Roe* Court built its opinion have been demolished by more extensive and detailed analysis.

While considerations of stare decisis weigh more heavily in the area of statutory construction, because the legislature is free to alter the construction, *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), this is not true in constitutional interpretation where change may only be made by the difficult process of constitutional amendment or reconsideration by this Court. *See Akron*, 462 U.S. at 420; *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962). Where "the unconstitutionality of the course pursued has . . . been made clear," this Court is "compel[led]" to disregard stare decisis. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938).

Justice Harry Blackmun, writing for the Court, acknowledged this principle in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-47 (1985). He wrote that this Court has readily reconsidered precedent where a decision affecting the allocation of constitutional powers proves, upon mature reflection and experience, to be "unsound in principle and unworkable in practice," and "leads to inconsistent results at the same time that it disserves principles of democratic self-governance." *Roe* is such a case.[10]

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[10] The *Roe* trimester scheme has proven inherently unworkable, making evident the arbitrariness of the lines drawn. The limitation of the state interests in maternal health and unborn life to periods of pregnancy identified by the shifting sands of medical technology makes no sense. As Justice O'Connor has said, "*[P]otential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward . . . . The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward." *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting) (emphasis in original). This arbitrariness is further evident in the increasingly complex line drawing in subsequent abortion cases. *Cf., e.g., Simopoulos v. Virginia*, 462 U.S. 506 (1983) (state may require that post-first trimester abortions be performed in a clinic) *with Akron*, 462 U.S. at 437-39 (state may not require that such abortions be performed in a hospital).

The doctrine of stare decisis is " 'a principle of policy and not a mechanical formula.' " *Boys Market, Inc. v. Retail Clerks*, 498 U.S. 235 (1970) (citation omitted). However, as the Court noted in *Vazquez v. Hillery*, 474 U.S. 254, 266 (1986) (citation omitted):

> [T]he careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'

There are several "articulable reasons" why the principle of stare decisis is no obstacle to reconsidering *Roe v. Wade*. *Cf.* Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. Rev. 231, 237 n.39.

First, there is Justice Powell's declaration of a Court duty to "reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627-28 (1974) (Powell, J., concurring). *Roe* has been relentlessly criticized, subjected to continuing efforts to rewrite its rationale, and rejected by the co-equal administrative and legislative branches of government. Wardle, *supra*, at 252. Clearly the Court has a duty to reexamine *Roe*.[11]

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[11] The radical departure of *Roe* from the norm of constitutional adjudication was evident in the prompt rejection of its analysis by legal scholars. So much ink has been spilled in the debate over *Roe* that a comprehensive review of the literature is impossible here.

By way of illustration, some are briefly discussed here. John Hart Ely's *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 935 (1973), may be the most insightful discussion of *Roe's* shortcomings as constitutional adjudication. After surveying its logical leaps and lapses, Ely concluded that *Roe* was a "Lochnering" opinion much more dangerous than the previous activist opinions of the Warren Court. *Roe*, he concluded, might be durable, but it was "a very bad decision. Not because it [would] perceptibly weaken the Court . . . and not because it conflict[ed] with [his] idea of progress . . . . It [was] bad because it [was] bad constitutional law, or rather

(Footnote continued)

Second, underlying the doctrine of stare decisis is the principle of consistency, which should require the Court to bring the abortion privacy doctrine into harmony with the rights of the unborn in other contexts. In 1983, Justice Brennan remarked that "the same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat more caution and deliberation, to seek consistency in the interpretation of the law at any given time." *Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391 (1983).

Roe and its progeny are anomalous across the legal landscape, distorting the "normal rules of law, procedure, and constitutional adjudication" which "suddenly become irrele-

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Footnote 11 continued

because it [was] *not* constitutional law and [gave] almost no sense of an obligation to try to be." *Id.* at 947 (emphasis in original). *Cf.* A. Cox, *The Role of the Supreme Court in American Government* 113-14 (1976).

Alexander Bickel wrote of *Roe*: "One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject." A. Bickel, *The Morality of Consent* 28 (1975). Richard Epstein argued that "*Roe* . . . is symptomatic of the analytical poverty possible in constitutional litigation." Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sp. Ct. Rev. 159, 185.

Two passages from the August, 1979, *Michigan Law Review*, an issue wholly devoted to abortion jurisprudence, summarize the critiques well. In the first, Richard Morgan observed:

> Rarely does the Supreme Court invite critical outrage as it did in *Roe* by offering so little explanation for a decision that requires so much. The stark inadequacy of the Court's attempt to justify its conclusions . . . suggests to some scholars that the Court, finding no justification at all in the Constitution, unabashedly usurped the legislative function.

Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 Mich. L. Rev. 1724, 1724 (1979).

In the second passage, the editors of the law review, surveying the literature on *Roe*, concluded, "[T]he consensus among legal academics seems to be that, whatever one thinks of the holding, the opinion is unsatisfying." *Editors' Preface*, 77 Mich. L. Rev. (no number) (1979).

The great doubt about *Roe's* validity, and the wide disagreement among scholars on an acceptable substitute for Justice Blackmun's opinion, suggest that *Roe* cannot be satisfactorily modified and should be overruled.

vant solely because a case touches on the subject of abortion." *Danforth*, 428 U.S. at 98 (White, J., concurring and dissenting). Where abortion touches the practice of medicine, the informed consent doctrine is rejected in favor of the older model of physician (and judicial) paternalism, which has itself been rejected in both law and medicine. *Cf. Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972) (recognizing the patient-discretion, informed consent model), *cert. denied*, 409 U.S. 1064 (1972), *with Thornburgh*, 106 S.Ct. at 2190 (Burger, C.J., dissenting) ("If the statute here is to be invalidated, the 'demand' will not even have to be the result of an informed choice.").

A startling inconsistency occurs when an unborn child in one hospital room is being aborted, while in the room next door another unborn patient is being medically treated, with full legal protection, simply because one mother prefers to abort her offspring and the other does not. Rights dependent on the preferences of another are inconsistent with the usual concept of rights. Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. Rev. at 254. "That the attempt of a distressed woman to kill her child shortly after birth is deemed a repugnant criminal act of child abuse or attempted homicide while the attempt of the same woman to kill the same child shortly before birth is deemed a fundamental constitutional liberty is an arbitrary discrepancy too large to ignore," observes Wardle. *Id.*[12]

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[12] *Roe* has had pernicious effects unseen by the *Roe* majority. *Roe's* faulty analysis of fetal rights has had an inhibiting effect on the development of fetal rights in other areas of the law. *See, e.g., Toth v. Goree*, 65 Mich. App. 296, 277 N.W.2d 297 (1976). This effect has been widespread, resulting in the failure of the law regarding the unborn to keep pace with scientific and medical understanding.

Another pernicious effect has been the "slippery slope" effect of *Roe* on other issues regarding legal protection of human life. It was predicted at the time the opinion was announced that the abortion precedent, because of its loose language and lack of constitutional roots, would expand into a precedent for infanticide and euthanasia. *See, e.g.*, Rice, *Dred Scott of the Twentieth Century*, 10 Hous. L. Rev. 1059, 1065-67 (1973). It is arguable that the casual attitude toward the rights of handicapped infants displayed in cases such as the Bloomington, Indiana, "Baby Doe" case is a function of *Roe*. *See*

(Footnote continued)

Third, a reexamination of cases which "marked a significant departure" from precedent is recognized by this Court as especially appropriate. *Id.* at 255 (citing *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627 (Powell, J., concurring); *Monnell v. Department of Social Servs.*, 436 U.S. 658, 695 (1978), and *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 273 (1980) (Stevens, J., plurality opinion)). In the United States, continuous protection of the unborn, by legal restriction of abortion from the period of pregnancy when the science of the day believed that life was present, had been in place from the inception of the nation and centuries before. The unprecedented scholarly outcry over *Roe* is further evidence of the abruptness of the departure of *Roe* from what had gone before.

Fourth, abortion jurisprudence has "deviated substantially from reasonable and workable methods of constitutional analysis," and has, instead, resorted to a rigid formalistic reliance on stare decisis (while, at the same time, gutting *Roe* of content). Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. Rev. at 256. Justice O'Connor observed, in her *Akron* dissent, that "[t]he Court's analysis . . . is inconsistent both with the methods of analysis employed in previous cases dealing with abortion, and with the Court's approach to fundamental rights in other

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Footnote 12 continued

In re the Treatment and Care of Infant Doe, No. GU-8204-004A, slip op. at 2 (Monroe County [Ind.] Cir. Ct., Apr. 12, 1983), Petition for Writ of Mandamus and Prohibition, *denied sub nom.* State of Indiana *ex rel* Infant Doe v. Monroe Circuit Court, No. 482S 140 (Ind. Apr. 14, 1983), *cert. denied*, 104 S. Ct. 394 (1983), *reprinted in* 2 Issues in Law & Med. 77 (1986). The "slippery slope" is also discernible in the attitudes expressed in other cases such as *American Academy of Pediatrics v. Heckler*, 561 F. Supp. 395 (D.D.C. 1983) (infanticide), *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986) (suicide), and the "wrongful life" cases in California (*Turpin v. Sortini*, 31 Cal.3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982), and elsewhere.

These developments along with the unforeseen landslide of abortions occurring in this country (about a million and a half a year) and in countries around the world (about fifty million a year), which are heavily influenced by the lead of this Court, argue that *Roe* has led to pernicious results. Therefore, this Court should reconsider *Roe* in light of these developments and the subsequent scholarly light shed upon the subject.

areas." 462 U.S. at 452-53. Lower courts have followed this "regressive formalism," reaching extreme results. Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. Rev. at 257. "When the underlying principles are so unworkable that rigid application of stare decisis results, it is time to reconsider the precedent," argues Wardle. *Id.*

Fifth, "[s]tare decisis has a more limited application when the precedent rests on constitutional grounds, as noted above, because 'correction through legislative action is practically impossible.' " *Washington Gas Light Co.*, 448 U.S. at 272-73 & n.18. The ultimate task of this Court in adjudicating claims of constitutional right is to interpret and apply the Constitution. If a line of cases, upon more mature reflection, appears unconstitutional, the cases must be overruled. Stare decisis is less binding in constitutional adjudication precisely because the Justice's first loyalty must be to the Constitution and not to their prior pronouncements. Of course, where cases such as *Roe* have not been overruled, then such precedent should be followed, including implementation of the state interests declared to be compelling. This has not been done, making the abortion right even more anomalous, absolute, and unconstitutional. The case for overturning *Roe* is more powerful now than when *Roe* was conceived in 1973. *See generally* Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. 231 (setting forth the many reasons why this Court is better equipped to handle the abortion issue now than it was in 1973 and why the constitutional imperative is even more pressing).

Justice Brandeis said that this Court has "often" overruled its prior decisions involving constitutional interpretation. *Burnet v. Colorado Oil and Gas Co.*, 285 U.S. 393, 407 (Brandeis, J., dissenting). In fact, this Court has expressly overruled its precedent over one hundred times, Pfeiffer, "Abandoning Error: Self-Correction by the Supreme Court," in *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* 5 (D. Horan, E. Grant, & P. Cunningham eds. 1987), and it has done so *sub silentio* numerous other times. *Id.* One commentator has observed:

> The practice of overruling error has been defended by the conservative nineteenth century Chief Justice Roger Brooke Tanney and championed by the liberal twentieth century Justice William O. Douglas. The necessity of jettisoning past mistakes is a belief that belongs to the ideology of no party and no faction and is as much an institution accepted by the whole Court as judicial review itself.

Id. at 7.

In sum, this case is well within the factors which this Court analyzes in determining whether reconsideration of a case is appropriate. Such reconsideration is appropriate in this case.

CONCLUSION

Wherefore, Petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the Michigan Court of Appeals.

Respectfully submitted,

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Appendix

TABLE OF CONTENTS

	Page
Mich. Sp. Ct.: Order	1a
App. Court: Order	3a
Trial Court: Stipulated Findings of Fact and Conclusions of Law	7a
Stoker, D.O.: Statement of Medical Judgment	20a

Order

Entered: September 22, 1988

Michigan Supreme Court
Lansing, Michigan

Dorothy Comstock Riley
Chief Justice
[list of justices omitted]

84149

SHAWN KATHLEEN LEWIS,

Plaintiff-Appellee,

v

SC: 841469
COA: 111440
LC: 88-159036-DM

CARLTON JAMES LEWIS,

Defendant-Appellant,

and

GENE MEYERS,

Guardian *ad litem* — Appellant.

Pursuant to this Court's order of September 15, 1988, the parties have filed additional pleadings in order to assist us in deciding whether to grant leave to appeal. We have considered those pleadings and the original application and motions, the Court of Appeals order dated September 15, 1988, and the orders of the trial court.

On order of the Court, the motions for immediate consideration are considered, and they are GRANTED. The applications for leave to appeal are also considered, and they are DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

The motions for stay are also considered. The stay provided for in this Court's order of September 15, 1988, is EXTENDED until 5:00 p.m. Monday, September 26, 1988. In all other respects, the motions for stay are DENIED.

The motion for special admission of foreign counsel is also considered, and it is GRANTED.

SEAL

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

September 22, 1988 /s/ _____

Corbin R. Davis
Clerk

Court of Appeals, State of Michigan

ORDER

Donald E. Holbrook, Jr.
Presiding Judge

William R. Beasley
Elizabeth A. Weaver*
Judges

SHAWN K. LEWIS v CARLTON J. LEWIS

Docket
111440

L.C. # 88 159036 DM

The Court orders that the motion for immediate consideration is GRANTED.

The Court orders pursuant to MCR 7.205(D)(2) that the lower court's injunction is DISSOLVED, because the injunction interferes with plaintiff's constitutional rights as set forth by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113; 93 S.Ct. 705; 35 L.Ed.2d 147 (1973), and *Planned Parenthood of Central Missouri v. Danforth*, 438 U.S. 52; 96 S.Ct. 2831; 49 L.Ed.2d 788 (1976).

The motion to appear and practice is GRANTED.

The motion for immediate consideration of the motion for stay is GRANTED.

The motion to stay the effect of this order is GRANTED and this order is STAYED until 5:00 p.m. Monday, September 19, 1988. No additional bond is required.

This Court retains no further jurisdiction.

*Judge Weaver concurs and states:

The law of the United States Constitution as announced by the United States Supreme Court is binding on trial courts and on appellate courts. That law can be changed in only two ways:

1. The United States Supreme Court can change its opinion;

2. Three-fourths of the state legislatures or state conventions called for said purpose can ratify an amendment to the United States Constitution proposed by two-thirds of both Houses of the United States Congress or proposed by a constitutional convention applied for by two-thirds of the state legislatures. (See U.S. Const. art. V).

The law of the United States Constitution as declared by the United States Supreme Court is clear in this matter. The United States Supreme Court wrote in *Roe v. Wade*, 410 U.S. 113, 163; 93 S.Ct. 705; 35 L.Ed.2d 147, 182 (1973):

> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, 35 L.Ed.2d 174, 175, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. . . .
>
> *"This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine,* ***without regulation by the State,*** *that, in his medical judgment,*[1] *the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effecuated by an abortion* ***free of interference by the State.***

---

[1] In *Roe v. Wade*, *supra*, at 35 L.Ed.2d 177, the United States Supreme Court listed factors involved in the physician's "medical judgment." The Court wrote:

> "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment

(Footnote continued)

"With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb . . . . If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." (emphasis added)

In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52; 96 S.Ct. 2831; 49 L.Ed.2d 788, 803 (1976), after noting that *Roe v. Wade* clearly established that "the State may not restrict the decision of the patient and her physician regarding abortion during the first stage of pregnancy," the Supreme Court held that "the State may not constitutionally require the consent of the spouse . . . as a condition for abortion during the first 12 weeks of pregnancy." *Id.* at 805. The Supreme Court said that "the State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.'" (citation omitted).

The trial court concedes at page 11 of its opinion that its injunction does constitute state action. That state action violates the law announced in *Roe v. Wade*, *supra*, and *Planned Parenthood of Central Missouri v. Danforth*, *supra*.

Footnote 1 continued

that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it . . . . [T]he additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation."

Although the issue of abortion raises important moral questions, such questions are not applicable to the decision here. Judges are sworn to uphold the Constitution and laws of the United States. They must apply the law of the United States Constitution as announced by the United States Supreme Court.

For the preservation of a society of laws, not of men, trial courts or appellate courts have no authority to change the law of the United States Constitution as announced by the United States Supreme Court.

SEAL

A true copy entered and certified by Ronald L. Dzierbicki, Chief Clerk, on September 15, 1988

/s/ _____

Ronald L. Dzierbicki
Chief Clerk

A TRUE COPY
John H. Trecha, Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF GENESEE

SHAWN KATHLEEN LEWIS,

Plaintiff,

vs.

CARLTON JAMES LEWIS,

Defendant.

File No. 88-159036-DM

Judge V. Washington

STIPULATED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Arthur C. Swirtz
Attorney for Plaintiff

Steven Moss
Attorney for Defendant

Linda Pylypiw
Shelly Spivack
Attorneys for ACLU

STATEMENT OF FACTS

See Stipulated Facts

Preliminary Statement

A document was presented to the Court at 5:00 p.m. on August 9, 1988 under the format of the spouse abuse injunction set forth in Michigan Compiled Laws 600.2950 and 552.14.

Time being of the essence in terms of the scheduled abortion, the Court signed the injunction in the obvious wrong form to prevent the abortion the following day. Apparently the injunction was served on a number of individuals and the abortion did not occur.

On or about August 17 the Court was contacted by Linda Pylypiw indicating that she was about to enter an Appearance

on behalf of Mrs. Lewis on the issue of the abortion and that she would be working with the American Civil Liberties Union and Attorney Shelly Spivack. A discussion was held in chambers with Attorney Pylypiw and Attorney Moss and it was determined by representations of Attorney Pylypiw that the first pregnancy for Mrs. Lewis had been very difficult and she had been advised medically not to have any more pregnancies. The Court advised Ms. Pylypiw that if this in fact was supported by medical documentation that the restraining order or the injunction would be dissolved on Friday, the 19th before the Court left for an anticipated ten (10) day vacation.

On Friday, the 19th, at approximately 3:00 p.m. Attorney Moss was present in the Court chambers and Ms. Pylypiw was on the speaker phone and it was determined that in fact there was no such medical documentation and the doctor in fact said that it was specifically a social decision as opposed to a medical decision to terminate the pregnancy.

At that time the Court offered Ms. Pylypiw a hearing relative to the issues of whether or not the preliminary injunction/temporary restraining order ought to be dissolved and it was decided that the anticipated return date of the Court of September 6 would be in plenty of time in terms of her client's physical condition to have a decision of the Court on the issue of dissolving the injunction. That being so the Court had no further contact with the case until September 6 when the parties convened at 3:30 p.m. for purposes of a decision. In the interim Briefs were filed on behalf of the Plaintiff and the Defendant as well as a Reply Brief by the Plaintiff. There are some unresolved questions as it relates to the conduct of the parties in this case. In particular they are as follows:

1. How was it that Mr. Lewis found out about Mrs. Lewis being pregnant?

2. Why did Mrs. Lewis share that information with anyone other than her physician when she realized that in fact she was pregnant?

3. Why didn't Mrs. Lewis simply have an abortion rather than talking it over with her husband?

4. Why didn't her attorney of record advise Mrs. Lewis that she could avoid the Court's jurisdiction by voluntarily dismissing her divorce action?

5. Why did Mr. Lewis seek to intervene and prevent Mrs. Lewis from having an abortion — what was his underlying motivation — is this a means of leveraging against the divorce, is this a tactic to prevent her from having the divorce which he obviously does not want.

6. How is that both the parties were able to reconcile periodically without filing a notice a [sic] reconciliation with the Court as provided by 3204(C)?

This failure to inform the Court of the reconciliation is not dispositive of the jurisdictional issue but is certainly something that a higher court may review if it wants and it is merely being pointed out to show that this Court recognizes that there may be jurisdictional ups and downs in this case.

As to the form of the Order that was originally entered it should be redrafted to comply with MCR 3.203 and 3.310 and in particular it should give notice that a hearing will be held relative to whether or not that Temporary Restraining Order should become a Preliminary Injunction on September 6, 1988 @ 3:30 p.m. In particular 3.310(c).

There was a stipulation as to the Statement of Facts set forth above so as to obviate the need for an evidentiary hearing relative to the Court's obligation to make findings of fact.

THE ISSUE PRESENTED

DOES THE STATE CIRCUIT COURT HAVE JURISDICTION AND AUTHORITY TO ENTER AN INJUNCTION PROHIBITING THE FEMALE PARTY IN A PENDING DIVORCE ACTION FROM HAVING AN ABORTION OF A CHILD CONCEIVED BETWEEN THE PARTIES DURING THE PENDENCY OF THE DIVORCE ACTION?

DISCUSSION

The Court's jurisdiction in divorce matters is by function of Statute and our actions are interpreted and directed by Com-

mon Law and Michigan Court Rules. We as trial Court's are not free to allow our personal views to interview [sic] with that which we must do according to the divorce practice within the State of Michigan. That being so, I at this point reference the pertinent divorce statutes and they are MCLA 552.6 where it sets forth the "no-fault" language which must be contained in the Complaint for Divorce and that is specifically that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. It is interesting to note that that same statute in section 1 prohibits the Plaintiff from making any further explanation for the grounds for divorce. At the same time it is set forth in the Michigan Rules of Court under Rule 3.204(a) that the following material must be contained in the Complaint for Divorce:

1. The complete names of the parties and their names before the marriage;

2. The complete names and the dates of birth of any minor children of the parties or children born during the marriage;

3. That their are no minor children of the parties or minor children born during the marriage, if there are none;

4. That the female party is pregnant, if she is;

5. The grounds for divorce or separate maintenance in the statutory language without further particulars;

6. The statutory residence requirements; and

7. Whether there is property to be divided.

It is also interesting to note that as it relates to divorce practice under the instructions that this Court was given at the new Judge's seminar between January 5 and 9, 1987, by the Michigan Judicial Institute that in a specific outline handed out

it was set forth that the proof requirements once the divorce got to Judgment stage should include the following:

1. Jurisdiction;
2. Validity of marriage;
3. Statutory grounds;
4. Whether female is pregnant.

At a special problems outline, page 11.

The divorce statute also goes onto [sic] to speak as to the power of the Court specifically at MCLA 552.12 when it says:

> Suits to annul or affirm a marriage, or for a divorce, should be conducted in the same manner as other suits and courts of equity; and the Court shall have the power to award issues, to degree [sic] costs, and to enforce its decrees, as in other cases.

The divorce statute further continues with the responsibilities of the Court as it relates to the care, custody and support of minor children during the pendency of the action when it states at section MCLA 552.15:

> After the filing of a complaint in an action to annul a marriage or for a divorce or separate maintenance, on the motion of either party or the Friend of the Court, **or on the Court's own motion,** the Court may enter such orders concerning the care, custody, and support of the minor children of the parties during the pendency of the action as the Court considers proper and necessary . . .

Further, the divorce statutes specifically speaks to the Court's requirement upon the entry of Judgment as relates to minor children and it says specifically at MCLA 552.16:

> Upon annuling [sic] a marriage or entering a Judgment of Divorce or Separate Maintenance, the Court may enter such orders as it considers just and proper concerning the care, custody, and support of the minor children of the parties . . .

It appeared that at one point there was a section specifically giving the types of evidence necessary for the taking of a divorce decree and those sections were MCLA 552.40 to 552.42. These were repealed by Public Act of 1961 No. 75, Section 2 effective January 1, 1972.

It is also a requirement that when the issue of custody is raised in any divorce action that the Child Custody Act of 1970 comes into play and that is found at MCLA 722.21. Of particular note is the section that defines "child" under that act, is [sic] as follows. That is found at MCLA 722.22(2)(a): "Child" means minor child and children.

The statute then goes on to define the best interests of the child being the sum total of a group of factors which must be evaluated and determined by the Court and they are found specifically at MCLA 722.23.

The Child Custody Act also requires that the Court make certain determinations as it relates to the rights of the children and that is found specifically at MCLA 722.24 wherein the statute says:

> In all actions now pending or hereafter filed in a Circuit Court involving dispute of custody of a minor child the Court shall declare the inherit [sic] rights of a child and establish the rights and duties as to custody, support, and visitation of a child in accordance with this Act.

The Child Custody Act further requires that the Court give liberal construction to the application of the Act specifically at MCLA 722.26 it says:

> The provisions of this Act being equitable in nature shall be liberally construed and apply [sic] to establish promptly the rights of the child and the rights and duties of the parties involved. This Act shall apply to all Circuit Court child custody disputes and actions whether original or incidental to other actions . . .

Along the same line as it relates to whether the Courts in Michigan and the legislature have looked to the issue of defin-

ing when a fetus becomes a person or a child or whether that child in utero has certain rights has been addressed by the Michigan Supreme Court in the case of *Tyler v. Tyler*, 348 Mich. 169 (1957). The issue in the *Tyler* case was whether or not the Plaintiff, a service man on leave who filed for divorce from his wife, and then withheld the fact that she was pregnant from the Court during the taking of the proofs and then departed for overseas duty could have the Judgment set aside with a provision made for a child who was in fact conceived during that leave. The trial Court made a finding that a man could not come in and submit himself to the Court's jurisdiction and then withhold the fact that the wife was pregnant from the Court and then object to the re-opening of the divorce decree. Specifically, the issue in the *Tyler* case was whether or not the decree could be set aside for the child that was not yet born. The issue was handled by the Court when it stated at page 172:

> We find it unnecessary to consider the various legal points Plaintiff has posed in his Brief. **This is a case where the Court below was under continuing duty to provide for the rights as well as the maintenance of the expected child.** Having been promptly apprised of an urgent fact not theretofore made known to him, that an only child of parties was due for birth without provision for such child having been made in the decree — the chancellor was duly empowered by the motion as filed and served on counsel of record to vacate the decree and its supporting order pro confesso. **Indeed, if he had been so minded, the chancellor for an abundant reason could have ordered a rehearing on his own motion.** *Tyler v. Tyler*, 348 Mich. 169 at 172. Emphasis supplied, citation omitted.

There is further finding in the Statutes of Michigan that an unborn person is to be given certain rights specifically in the Revised Judicature Act found at MCLA 600.2045 Section 1:

> If in an action or proceeding, other than one in Probate Court, it appears that a person not in being may become entitled to a property interest, real or personal, legal or equitable, involved in or affected by the action or proceeding, and the interests of the unborn person is not or cannot

> otherwise properly be represented and protected, the Court, **upon its own motion,** or upon the motion of any party, may appoint a suitable person to appear and act of [sic] Guardian Ad Litem of the unborn person. The Guardian Ad Litem is authorized to engage counsel and do whatever is necessary to defend and protect the interests of the unborn person. A Judgment or order made after the appointment shall be conclusive upon the unborn person for whom a Guardian was appointed.

I have taken the time to enumerate the standards set forth under divorce proceedings because I think it is very important in a case that deals with the highly emotional issue of abortion to set the parameters so that people know exactly what is being ordered, and what is not being ordered.

The Plaintiff in this case is raising several issues in her Brief. She states that she one was served with an imperfect order. That has [sic] conceded and will be corrected in short order. However, the substantive arguments are that there is no right on behalf of the State to interfere in the decision to terminate a pregnancy during the first trimester. She relies heavily on *Roe v. Wade*, 410 U.S. 113; 93 S.Ct. 705; 35 L.Ed 2d 147 (1973), which according to Plaintiff held that a woman's decision whether or not to terminate her pregnancy is protected by the right of privacy founded in the 14th Amendment of the United States Constitution and no State may interfere in that decision. That interpretation is an overly broad reading of what was found in *Roe v. Wade*. I went through and re-read that case several times and its holding specifically states that a State may not set forth criminal abortion statutes that are overly broad in nature, that is not making a distinction between the first trimester and second and third trimesters of a woman's pregnancy and it speaks specifically to State regulation by way of statute. The only issue or the only section of the holding which may give some basis to Plaintiff's position is that set forth at Subsection A which states:

> For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must

be left to the medical judgment of the pregnant woman's attending physician.

That section of the holding if taken out of context would appear to abrogate the finding in *Tyler v. Tyler, supra*, and the provisions of MCLA 600.2045 as well as the inferential responsibilities placed in the trial Court by the Child Custody Act of 1970 and the divorce statutes, and Michigan Court Rule 3.204.

However, if that Subsection is read in the total context of the decision it is clear that the high Court was speaking of statutory regulation and not merely State action. A position that Plaintiff makes in her Brief at page 10 is that the State Court injunction does constitute State action, that is not disputed by this trial Court. This trial Court's position is that it is caught in a quandry between the United States Supreme Court, and its decision in *Roe v. Wade* whether or not it applies to actions by the judiciary since that was not specifically addressed, the findings in *Tyler v. Tyler* that the Court was under a continuing duty to make provisions for the expectant child; indeed in the *Tyler* case in the research headnote which is not cited for authorative purposes but merely for research availability including shepardizing, it is interesting to note that the holding is set forth as earlier recited, but there is also a reference to Court Rule No. 28 Section 4 (1945) which would indicate again an existing Supreme Court Court [sic] Rule governing the issue of unborn children.

The issue of whether or not *Roe v. Wade* specifically overruled the holding in *Tyler v. Tyler* was addressed at least in this Court's mind by the Shepardizing of the *Tyler* decision. Obviously, *Tyler* was an earlier decision than *Roe v. Wade* and if in fact it was overruled by that narrow Subsection A of the Supreme Court's holding then indeed that would have been set forth in the *Shephard's* citations. That is not found by this Court on its review of the citations. Thus, the most logical conclusion is that the United States Supreme Court was addressing the issue of the State regulation in the form of Statute and not addressing the issue as it related to a Common Law decision.

The Defendant makes an interesting observation in terms of how a child is defined, however, as we see in the Child Custody Act, a child has a very broad definition. If we take the ordinary meaning as found in Webster's Third New International Dictionary Unabridged 1961 Edition, adopted from page 9 of Defendant's Brief, we note that unborn or recently born human beings are defined as "children". This was apparently reaffirmed in Webster's Ninth New Collegiate Dictionary of 1974, "an unborn or recently born person". Apparently this was further adopted in Black's Law Dictionary Fifth Edition 1979 which defines child as an unborn or recently born human being.

It is clear to this Court that there has to be some sort of willingness by the highest Court in the State of Michigan and perhaps the United States Supreme Court to address the issue of divorce law and the responsibility of the Court verses [sic] the private rights of the individuals. In this Court's view this is not a case of mother's right to terminate pregnancy verses [sic] father's rights to veto pregnancy, thus I have not addressed the issues set forth in the *Planned Parenthood v. Danforth* case (citation omitted).[1] I don't think that is the issue here. As I look at the issue the parties in this case submitted themselves to the jurisdiction of the Court under the cloak of the Divorce Statute, Common Law, and Michigan Court Rules. Once that occurred an additional responsibility was placed on the Court to look into the interests of any minor children that the parties may have. Clearly, the parties did not at the time of filing have more than one minor child. As this Court is able to research it, on short notice, it appears that there is a wide open view as to what constitutes a child. Under present Michigan Law, statutory, case law, and Court rule. [sic] Why would the Michigan Court Rules, as set down by the Michigan Supreme Court make counsel place in the Complaint whether or not the female is

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[1] Nor the other issues raised by Plaintiff in her Brief as I do not feel they need to be addressed within the narrow context of this Court's Opinion, as to the issue presented for analysis.

pregnant? Why, if there is to be no intervention would the Judicial Institute tell new Judges as of 1987 that they must have proof that the female is not pregnant? These questions are not answered directly. They need to be!

People should know specifically how the legislature is defining a minor child. Conversely, they need to know why and whether or not there will be intervention on behalf of the Court if a child is conceived during the course of a marriage. This is not the case where the parties were estranged and there was a conception by someone other than the parties. This is a case that falls, in this Court's view squarely within the jurisdiction of divorce proceedings, and this Court is going to preserve the status quo until it is given direction from a higher court, preferably the Michigan Supreme Court as it is their Court Rule that inferentially gives the trial Court the responsibility to look after the interests of an unborn child, and their earlier *Tyler* decision that says there is a continuing duty as it relates to the rights and maintenance of an expected child, but gives no definition of that duty.

I am not getting into the issue of how other areas of Michigan Law treat the fetus. Although I do note for the record that it appears that there is some consideration of what happens to a child in utero as was decided *in the Matter of Baby X* [,] 97 Mich. Appeals 111 (1980), and in the tort area as set forth in *Womack v. Buchhorn*, 384 Mich. 718 (1971), and *O'Neal* [sic] *v. Morris*, 385 Mich. 130 (1971), and it appears that at least that at one point one of the Supreme Court Justices was of the opinion that there needs to be a judicial determination of personhood of the unborn. See *Kilpatrick v. St. Joseph Hospital*, (Docket #61528). That would have been specifically Justice Ryan in a dissenting Opinion on that application found at 409 Mich. 868, wherein he says:

> Judicial determination of the personhood of the unborn is a vitally important question of highest juris prudential [sic] significance. The law on this question is unclear and apparently contradictory. See *Tunnicliffe v. Bay City's*

Consolidated Rail Co. 102 Mich. 624; 61 N.W. 11 (1894); *O'Neal* [sic] *v. Morris*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Toft* [sic] *v. Goree*, 65 Mich. Appeals 296; 237 N.W.2d 297 (1975); *Roe v. Wade*, 410 U.S. 113; 93 Sup. Ct. 705; 35 L.Ed.2d 147 (1973).

In that case the issue was whether or not a thirteen week old fetus was a person. If so, then he felt that further oral argument and briefing were indicated. Because the question was whether or not the mother and father in a common law negligence action could claim damages for the loss of society and companionship of a thirteen week old fetus which was aborted due to alleged negligently [sic] injury inflicted by the Defendant upon Plaintiff mother and proximately causing the abortion.

CONCLUSION

As all can see this is not a case where we have simply two people who happen to create a fetus. What we have are two people who have come under the jurisdiction of the Divorce Statutes, Case Law, and Court Rules. Because of that, they are in a unique position as it relates to the issue of terminating a pregnancy. As this Court reads the various cases, and statutes, and Court Rules, the inference is quite clear, if not the absolute direction, and that is, if there is a child conceived during the term of the marriage while the divorce is pending that divorce cannot be concluded until provisions are made for that child. Specifically, when you look at the Revised Judicature Act, MCL 600.2045, the issue becomes whether or not that child once conceived then is entitled to birth without outside interference.

That question is not one which apparently has been posed or answered in any case that this Court is able to research and uncover. Because of that, I am not dissolving the Temporary Restraining Order of 8/9/88. I am making it a Preliminary Injunction from this point forward directing that the form of the original Injunction be modified to resemble that of a Tempo-

rary Restraining Order Nun [sic] Pro Tunc to August 9, 1988, and will gladly certified [sic] this issue to the higher Appellate Courts, at the parties [sic] pleasure to the Court of Appeals, more appropriately to the Michigan Supreme Court.

Further, I hereby appointed Attorney Gene Myers as Guardian Ad Litem for this child during the pendency of this matter.

IT IS SO ORDERED, AND THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL THERE BEING NO JUST CAUSE FOR DELAY.

/s/ _____
Valdemar L. Washington
Circuit Court Judge

Dated: September 6, 1988

VALLEY MEDICAL CENTER
John L. Stoker, D.O.
5142 Miller Rd.
Flint, Mi. 48507

NAME: Cari Ann

DATE: 8-18-87

Totally Incapacitated: _____

Partially Incapacitated: X

From _____ Thru _____

It is in mental
deficiency and a medical
decision for a TAP
with this patient.

SIGNED: John L. Stoker DO

JOHN L. STOKER, D.O.

88-688

(8) Nos. 88-555, 88-

Supreme Court, U.S.
FILED
NOV 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

GENE MYERS, Guardian Ad Litem,

Petitioner,

—v.—

SHAWN KATHLEEN LEWIS,

Respondent.

CARLTON JAMES LEWIS,

Petitioner,

—v.—

SHAWN KATHLEEN LEWIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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10 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should refuse to decide, on the facts of this case, if *Roe v. Wade* and its progeny held that only certain medically necessary abortions are constitutionally protected in the first trimester, given that the facts concerning the medical necessity of Ms. Lewis' abortion are in dispute, and no Michigan statute attempts so to restrict womens' freedom to choose abortion.

2. Whether this Court should overrule *Roe v. Wade* and its fifteen years of decisions reaffirming *Roe*, in this case.

TABLE OF CONTENTS

PAGE

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF JURISDICTION 1

COUNTERSTATEMENT OF THE CASE 3

REASONS WHY THE PETITIONS SHOULD BE DENIED 10

I. THIS COURT'S PRIOR DECISIONS UPHOLDING WOMEN'S REPRODUCTIVE FREEDOM ARE DISPOSITIVE AND WERE PROPERLY APPLIED BY THE MICHIGAN COURT OF APPEALS 11

A. A Woman's Constitutional Right To Decide Whether To Terminate Her Pregnancy Is Not Contingent Upon A Showing That The Abortion Is Medically Necessary 11

II. PETITIONERS' "QUESTIONS PRESENTED" ARE NOT PROPERLY RAISED BY THE FACTS OF THIS CASE BECAUSE NO DETERMINATION WAS MADE BY MS. LEWIS' ATTENDING PHYSICIAN THAT AN ABORTION WAS NOT MEDICALLY NECESSARY 15

PAGE

III. AS THIS COURT'S DECISIONS MAKE CLEAR, THE DECISION OF THE MICHIGAN COURT OF APPEALS DOES NOT CONFLICT WITH ANY COMPELLING INTEREST ASSERTED BY THE STATE OF MICHIGAN OR ANY FEDERAL RIGHT ASSERTED BY PETITIONERS 16

A. A Man Does Not Have A Constitutional Right To Interfere With A Woman's Decision To Have An Abortion 16

1. The Fourteenth Amendment Affords Individuals Protection Only From State Action, And Does Not Apply to Wholly Private Acts Such As A Woman Choosing An Abortion 18

a. Right To Procreate 20

b. Rights Derived From Marriage 21

c. The Right To Raise One's Children 23

B. The State of Michigan Has Not Asserted A Compelling Interest In Fetal Life In Order To Deprive Women Of Their Right To Choose Abortion 23

IV. THE MICHIGAN COURT OF APPEALS DECISION IS CONSISTENT WITH THE DECISIONS OF EVERY APPELLATE COURT TO CONSIDER THE ISSUE 26

V. NO REASON EXISTS FOR THIS COURT TO TAKE THE EXTRAORDINARY STEP OF RECONSIDERING ITS WELL-ESTABLISHED AND UNBROKEN PRECEDENT RECOGNIZING A WOMAN'S RIGHT TO END AN UNWANTED PREGNANCY 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases PAGE

Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972), *vacated and remanded on other grounds*, 410 U.S. 951 (1973) 1

Akron Center for Reproductive Health v. City of Akron, No. C78-155A (N.D. Ohio May 16, 1978) (order denying motion to intervene in relevant part) (subsequent history on merits omitted) 3

Allen v. Wright, 468 U.S. 737 (1984)..... 2

Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970)..... 2

Beal v. Doe, 432 U.S. 438 (1977) 29

Bellotti v. Baird, 428 U.S. 132 (1976) 29

Bellotti v. Baird, 443 U.S. 622 (1979).....17, 29-30

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Byrn v. New York City Health & Hosps. Corp., 31 N.Y.2d 194, 286 N.E.2d 887 (1972), *appeal dismissed* 410 U.S. 949 (1973) 2

Caban v. Mohammed, 441 U.S. 380 (1979) 19

Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) .. 21-22

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PAGE

Civil Rights Cases, 109 U.S. 3 (1883)..... 19

Colautti v. Franklin, 439 U.S. 379 (1979)..... 29

Coleman v. Coleman, 57 Md. App. 755, 471 A.2d 1115 (1984)..... 27

Conn v. Conn, 526 N.E.2d 958 (Ind. 1988), *applications for stay denied*, No. A-88-55 (U.S. July 22, 1988) (letter from the Clerk of the Court), *petition for cert. filed*, 57 U.S.L.W. 3186 (U.S. Sept. 23, 1988) (No. 88-347)..... 27

Connecticut v. Menillo, 423 U.S. 9 (1975) 13, 29

Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970) (three-judge court), *modified*, 410 U.S. 179 (1973) ..... *passim*

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H.L. v. Matheson, 450 U.S. 398 (1981)..... 30

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PAGE

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Loving v. Virginia, 388 U.S. 1 (1967) 28

Maher v. Roe, 432 U.S. 464 (1977) 26, 29

Margaret S. v. Edwards, No. 78-2765 (E.D. La. Oct. 2, 1978) (order denying motion to intervene) (subsequent history on merits omitted) 3

McGarvey v. Magee-Womens Hosp., 340 F.Supp. 751 (W.D. Pa. 1972), *aff'd*, 474 F.2d 1339 (3rd Cir. 1973) 1-2

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Przybyla v. Przybyla, 87 Wis. 2d. 441, 275 N.W.2d 112 (Wis. Ct. App. 1978)..... 27

PAGE

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Whalen v. Roe, 429 U.S. 589 (1977) 14

Woe v. Bear, No. H-79-1866 (S.D. Tex. May 5, 1980) (order denying motion to intervene) (subsequent history on merits omitted)..... 2-3

Zbaraz v. Quern, No. 77-C-4522 (N.D. Ill. May 15, 1978) (order denying motion to intervene) (subsequent history on merits omitted)..... 3

PAGE

Constitution, Statutes, and Rules

Mich. Comp. Laws Ann. § 600.2045 (West 1981) 1

Mich. Comp. Laws Ann. § 722.22(2)(a) (West Supp. 1988) 24

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Sup. Ct. R. 17 10

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Drama of Life Before Birth, Life Magazine, Apr. 30, 1965 29

Letter from Attorney General Frank Kelly to Social Services Director C. Patrick Babcock (Mar. 28, 1988)... 26

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Respondent Shawn Lewis submits this brief in opposition to the Petition for a Writ of Certiorari filed by Gene Myers, guardian ad litem for the fetus, on September 30, 1988, as well as the Petition for a Writ of Certiorari filed by Carlton Lewis, Ms. Lewis' ex-husband, on October 21, 1988. Both Petitions seek review of the judgment entered by the Michigan Court of Appeals in this action.

COUNTERSTATEMENT OF JURISDICTION

The guardian ad litem does not have standing to bring this claim seeking to deprive Ms. Lewis of her constitutional right to choose to have an abortion; therefore his Petition must be denied. A guardian ad litem may have standing to raise some claims on behalf of a fetus, such as claims necessary to protect the property interests of a child that will be born.[1] This Court has made absolutely clear, however, that a fetus has no "right to life" and thus no basis for invoking the power of the state to interfere with a woman's decision to have an abortion. The Court has held unequivocally that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe v. Wade*, 410 U.S. 113, 158 (1973). This holding is consistent with case law even before *Roe* establishing that fetuses are not persons under the Constitution. *See Abele v. Markle*, 351 F. Supp. 224, 228 (D. Conn. 1972), *vacated and remanded on other grounds*, 410 U.S. 951 (1973); *Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (E.D.N.Y. 1972) (three-judge court), *aff'd in part sub nom.* *Ryan v. Klein*, 412 U.S. 924 (1973) (appeal by intervenors asserting interests of fetuses), *vacated & remanded in part sub nom. Commissioner of Social Servs. v. Klein*, 412 U.S. 925 (1973) (appeal by state); *McGarvey v. Magee-Womens Hosp.*, 340 F. Supp. 751 (W.D. Pa.

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1 Although the Michigan law upon which the trial court relied permits the appointment of a guardian to protect the *property* interests of a "person not in being," Mich. Comp. Laws Ann. § 600.2045 (1) (West 1981), there is no provision in Michigan state law that would permit the appointment of a guardian ad litem for a fetus in the circumstances of this case. Myers App. 13a.

1972), *aff'd*, 474 F.2d 1339 (3rd Cir. 1973); *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887 (1972), *appeal dismissed*, 410 U.S. 949 (1973); *see also Roe*, 410 U.S. at 157 ("[T]he appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment."). The lower federal courts have, of course, followed this Court's holding in *Roe*.[2]

Because a fetus is not a person under the Constitution, a guardian ad litem for the fetus obviously does not have standing to bring a claim.[3] "The law is clear that an unborn child is not a person under the Fourteenth Amendment of the United States Constitution and therefore the unborn child and persons acting in behalf of an unborn child may not assert the deprivation of any rights or privileges secured by the Amendment." *Poole v. Endsley*, 371 F. Supp. 1379, 1382-83 (N.D. Fla. 1974), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975) (citing *Roe v. Wade*); *see also Brady v. Doe*, 598 S.W.2d 338 (Tex. Civ. App. 1980), *cert. denied*, 449 U.S. 1081 (1981); *Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57 (1977).

Guardians ad litem for fetuses also have been denied standing to intervene and challenge a woman's right to choose abortion, even though the requirements of standing for purposes of intervention are more easily met than those for purposes of bringing a claim. *See Woe v. Bear*, No. H-79-1866 (S.D. Tex. May 5,

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2 *See, e.g., Ruiz Romero v. Gonzalez Caraballo*, 681 F. Supp. 123 (D.P.R. 1988); *Harman v. Daniels*, 525 F. Supp. 798 (W.D. Va. 1981), *Civic Awareness of Am., Ltd. v. Richardson*, 387 F. Supp. 1086 (E.D. Wis. 1975), *aff'd*, 532 F.2d 756 (7th Cir.), *cert. denied*, 429 U.S. 829 (1976); *Poole v. Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975).

3 In order to have standing and satisfy the "case or controversy" requirement of Article III, a litigant must show that the interest sought to be protected by the complainant is arguably "within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982) (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)); *see also Allen v. Wright*, 468 U.S. 737, 751 (1984).

1980) (order denying motion to intervene) (subsequent history on merits omitted); *Roe v. Casey*, No. 78-2214 (E.D. Pa. Dec. 11, 1978) (order denying motion to intervene) (subsequent history on merits omitted); *Margaret S. v. Edwards*, No. 78-2765 (E.D. La. Oct. 2, 1978) (order denying motion to intervene) (subsequent history on merits omitted); *Akron Center for Reproductive Health v. City of Akron*, No. C78-155A (N.D. Ohio May 16, 1978) (order denying motion to intervene in relevant part) (subsequent history on merits omitted); *Zbaraz v. Quern*, No. 77-C-4522 (N.D. Ill. May 15, 1978) (order denying motion to intervene) (subsequent history on merits omitted); *Ryan v. Klein*, 412 U.S. 924 (1973);[4] *Doe v. Bolton*, 319 F. Supp. 1048, 1057 (N.D. Ga. 1970) (three-judge court), *modified*, 410 U.S. 179 (1973).

Because the guardian ad litem can only claim the interests of the fetus he purports to represent, and the fetus is not a person under the Fourteenth Amendment, the guardian ad litem lacks the requisite standing under Article III to bring this claim.

COUNTERSTATEMENT OF THE CASE

Respondent Shawn Lewis, a battered wife, divorced petitioner Carlton Lewis on October 24, 1988. Ms. Lewis filed her complaint for divorce on January 20, 1988 in the Genesee County Circuit Court before the Honorable Valdemar Washington. Ms. Lewis sought a divorce because Mr. Lewis physically abused her, refused to contribute, financially or otherwise, to the support of their household, and repeatedly

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4 In *Ryan*, intervenors purporting to represent embryos and fetuses, appealed the ruling of a three-judge court holding unconstitutional New York's refusal to fund legal abortions. In a separate appeal by the state, the Court vacated the district court order and remanded the case for reconsideration in light of *Roe v. Wade*. *Commissioner of Social Servs. v. Klein*, 412 U.S. 925 (1973). On the intervenor's appeal however, the Court summarily affirmed the district court, indicating its refusal to recognize claims of purported guardians ad litem in abortion cases.

abandoned Ms. Lewis and their infant son Christopher. *See* App. 3a-4a.[5]

Ms. Lewis' first pregnancy, with Christopher, her one child, was extremely difficult. She was continually ill, suffering from high blood pressure, high blood sugar and kidney infection (for which she was hospitalized for a week), and was confined to her bed for much of the last three months of the pregnancy. App. 2a. Mr. Lewis was furious that the pregnancy made her sick. As Ms. Lewis told the county court:

> Carl [Lewis] left three times during the pregnancy for about two weeks each time. Just before Christmas 1986 he left. He said that he couldn't handle it that I couldn't go anywhere or do anything and that I was constantly ill. He went and lived with his brother; and, at that time, he stated that he did not want the child that I was carrying. I went to his brother's house and begged him to come back.
>
> He left again the end of January or beginning of February 1987. We were fighting because he wanted to go to his cousin's home, someone I didn't approve of because he is a heavy drinker and Carl was influenced by this cousin. I wanted him to stay with me; but, he told me to get out of the car and dropped me off by the overpass at Court Street and Dort Highway. I walked home in the snow, 7 months pregnant, in cowboy boots and a light jacket. I got about three blocks from home after I had walked almost two miles when he sent a friend, Joe Stevens, to pick me up. When I got home, Carl had taken all of his things and moved to his brother's.

App. 2a-3a.

After Ms. Lewis gave birth to Christopher, Mr. Lewis became physically abusive. A police complaint described one assault:

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5 Citations to Mr. Myers' Petition For A Writ of Certiorari will be in the form "Myers Pet. ___" and those to Mr. Lewis' Petition will be in the form "Lewis Pet. ___." Citations to the appendix to Respondent's Brief In Opposition will be in the form "App. ___," those to Mr. Myers' appendix will be in the form "Myers App. ___" and those to Mr. Lewis' appendix will be in the form "Lewis App. ___."

> [Ms. Lewis] states that her husband who moved out a week ago came over and started a fight with [Ms. Lewis]. [Mr. Lewis] hit [Ms. Lewis] on boths [sic] arms and left side. [Mr. Lewis] then push [sic] [Ms. Lewis] threw [sic] the screen door. [Mr. Lewis] then left.

App. 8a. As a result of this physical abuse, the court issued a preliminary injunction on April 18, 1988 ordering Mr. Lewis to "desist and refrain from beating, assaulting, or in any way harassing or physically abusing [Ms. Lewis]." Preliminary Injunction Under MCR 3.310, MCR 3.203(c) And Public Acts 316-318 of 1978, No. 88-159036-DM, at 2 (Apr. 18, 1988). Mr. Lewis continued to leave home for extended periods of time.

> [W]hen Christopher was born in April, when he was 5 weeks old—about May 24th, which is around the time he beat me up (a copy of the police report is attached), he left again. At that time, I was undergoing heart testing because my father had just had open heart surgery for a diseased valve which was hereditary. In addition, I had an infection in my tubes from the pregnancy.
>
> . . . .
>
> When Carl left that time, he went to his mother's for at least two weeks. Each time he was gone, he was gone about two weeks—long enough to get a full paycheck and spend it on himself. Then he would come back.
>
> After he came back home, he didn't have a lot of patience with the baby. . . . He . . . would want to go out after he got home from work. I couldn't go out because I would have to get up at 6 o'clock in the morning and take care of the baby. We fought a lot about that.
>
> I never left Carl alone with Christopher very often. . . . One time when I let [sic] him with Christopher, he let Christopher fall off the couch and badly scratched his head.
>
> Things were better until he left again November 1, 1987. He took our son trick-or-treating the night before and I thought everything was okay. He left and went to his mother's house. The next day he called my parents and

> told them that he no longer could handle it, that he didn't want the responsibility of Christopher and me, and to find someone else to take care of us. On November 2nd, I went down and filed for ADC.
>
> At that time, the heat bill was at least 2 months behind, the water was to be turned off, and the phone had been turned [off] because the bills hadn't been paid in a couple of months. He spent the money on his dune buggy. I applied for emergency help for the water, emergency food stamps, and I had to borrow money from my parents for diapers, etc.

App. 3a-4a.

During the nine months since Ms. Lewis filed for divorce, Mr. Lewis has continually harassed her, often forcing Ms. Lewis to call the police. *See* App. 6a. Mr. Lewis has broken into her house on numerous occasions, destroyed her property, made threatening phone calls, and acted irresponsibly in caring for Christopher:

> Carl had a nervous breakdown near the end of February. He had broken into my house (police report attached). Dr. John Stoker treated him with antidepressants. He was hospitalized but I don't know for how long or where he was hospitalized. . . . I was concerned about allowing Carl to have Christopher for visitation because of the medication he was on and the alleged drug overdose of prescription pills and cutting his wrists.
>
> . . . .
>
> During that time there were more break-ins (police reports attached). On March 6, Carl had broken into the home. . . . It was his visitation weekend. He dropped Christopher off at a neighbor's house because he didn't want Christopher any more (copy of statement from neighbor is attached). I pulled in the driveway and Carl was sitting out in the street. He said, "Your precious little son is at one of the neighbors' houses."
>
> I went inside the house and called the police. Before they arrived, I wanted [sic] to three different houses to look for

> Christopher before I found him. I returned to the house and there was broken glass everywhere and the front screen was all bent and ripped. Once I got inside the house, I sat down with Christopher and waited for the police.
>
> While I was waiting, Carl returned and he was standing over me when Policeman Chris Blinkilde arrived. The officer asked me what was happening and he separated Carl and me. . . . At that point, Carl took a handful of pills out of his pocket and put them into his mouth in front of the officer. The officer handcuffed him, put him in the police car and took him downtown.
>
> . . . .
>
> Since then, the break-ins have continued and on July 1st, he refused to pay any additional child support. He didn't pay any support again until September, just before we went to court for the abortion issue.
>
> Since the Circuit Court hearing on the abortion issue, he has continuously harassed me, threatened me. I've had to leave my home because he wouldn't leave us alone. He would call at 1 o'clock in the morning, 5 o'clock in the morning. After I went to stay with my parents in Waterford, he still called long-distance to harass us.
>
> . . . .
>
> If he didn't call, he was there in the morning and at night. He would stand outside banging and screaming and yelling and pounding on the windows. The police were usually called. One weekend he did it and three police cars came.

App. 4a-6a.

Although the parties had not reconciled they engaged in sexual intercourse on one occasion, July 7, 1988, before the divorce was final. Ms. Lewis used a spermicide as a means of birth control.

On August 8, 1988, Mr. Lewis learned that Ms. Lewis was pregnant. That same day, he petitioned the court to force her to continue the pregnancy, and then give him full custody of any

child.[6] Judge Washington immediately issued a one-year injunction against any abortion, without notice to Ms. Lewis or her attorney. The court did not set a hearing at which Ms. Lewis could object to the injunction.

On August 17, Ms. Lewis requested that the injunction be dissolved. Judge Washington met in his chambers on August 19 with Mr. Steven Moss, counsel for Mr. Lewis. Ms. Linda Pylypiw, counsel for Ms. Lewis, was contacted only by telephone. Both petitioners seriously misrepresent the untranscribed telephone conference; they falsely assert that Ms. Pylypiw conceded that the medical judgment of Ms. Lewis' attending physician was that an abortion was not medically necessary to preserve Ms. Lewis' health. In fact, the trial court made no finding that Ms. Pylypiw made this concession, petitioners do not cite any evidence to support their assertion that she made this concession, and the record contains no such support. Ms. Pylypiw has enclosed in the appendix a declaration to point out these misrepresentations. *See* App. 20a.

Petitioners also rely on a statement by Dr. John Stoker which states "It is a social decision not a medical decision for a t.o.p. with this patient." *See* Lewis App. 20a. The record contains no evidence that Dr. Stoker was even Ms. Lewis' attending physician at that time. In fact, Dr. Stoker was *not* Ms. Lewis' attending physician—he had never even examined her in connection with this pregnancy. He was her physician in her first pregnancy with Christopher. Ms. Lewis has filed a complaint against Dr. Stoker with the Genesee County Osteopathic Medical Association, App. 16a, for misrepresenting his relationship with her, for violating the physician-patient privilege and for apparently signing conflicting letters—one that said an abortion was necessary to preserve Ms. Lewis' health, App. 19a, and one that says it was not, Myers App. 20a. Ms. Lewis has asked that the Medical Association order Dr. Stoker to correct what apparently was a fraud on the court.

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6 Mr. Lewis later petitioned the court to order Ms. Lewis to undergo an ultrasound. Petition For Order For Ultrasound Or Other More Accurate Determination of Length Of Pregnancy, No. 88-159036-DM (filed Sept. 2, 1988).

Despite Ms. Lewis' request for an immediate hearing, the court did not hold a hearing until September 6, one month after it enjoined Ms. Lewis from ending her pregnancy. The hearing was held in open court with the press and the public in attendance. At the hearing, Judge Washington acknowledged that the injunction cited improper statutory authority; he refused, however, to dissolve the injunction, and, in fact, issued a new preliminary injunction *nunc pro tunc* to August 9. The court did not rest its order on the "rights" asserted by Mr. Lewis, stating "I don't think that is the issue here." Myers App. 16a. Rather, the court applied the rights of minor children to a fetus. The court concluded that *Roe v. Wade* did not prohibit the enjoining of Ms. Lewis' abortion because "the United States Supreme Court was addressing the issue of the State regulation in the form of Statute and not addressing the issue as it related to a Common Law decision." Myers App. 15a. After issuing its opinion, the court appointed a guardian ad litem for the fetus for purposes of appeal; this was done sua sponte and without affording counsel an opportunity to object.

Ms. Lewis immediately appealed on September 7. The Michigan Court of Appeals granted emergency leave to appeal and on September 15 ordered that the injunction be dissolved as violative of Ms. Lewis' constitutional rights. The court, however, granted Mr. Lewis' request to stay its order until September 19. On September 15 the Michigan Supreme Court extended the stay until further order. On September 22 the Michigan Supreme Court denied the Application for Leave to Appeal filed jointly by Mr. Lewis and the guardian ad litem, but extended its stay until September 26 to allow an application for a stay to the United States Supreme Court.

Both Mr. Lewis and the guardian ad litem applied to Justice Antonin Scalia for a stay. Justice Scalia referred the matter to the full Court, which denied the application on September 26 without comment. Nos. A-240, A-244, mem. (U.S. Sept. 6, 1988) Thus, Ms. Lewis was barred by court order from exercising her right to have an abortion for a total of seven weeks, during which time she endured the severe mental strain of not knowing when, if ever, she would be "permitted" to end her unwanted pregnancy.

The day that the Michigan Court of Appeals upheld Ms. Lewis' constitutional rights, Mr. Lewis threatened to kidnap Christopher if she had terminated her pregnancy:

> On September 15, 1988, I was gone all day so I left the answering machine on. When my mother and I got home about 5 o'clock, there was a message from Carl; and, he said that if I had done what he thought I had done, he would take Christopher and I would never see him again and, "That's a promise."

App. 6a. Two days after the stay was dissolved, a warrant was issued for the arrest of Mr. Lewis on the charges of unlawful entry. On that date, Mr. Lewis kicked down the steel door to Ms. Lewis' house, which she had dead-bolted, and entered her home accusing Ms. Lewis of "killing his baby." *See* App. 14a. A friend managed to keep Mr. Lewis from approaching Ms. Lewis, who managed to call the police. Mr. Lewis' attorney, Steven Moss, was quoted as saying of the incident "I don't know what I would do if that was me. I might beat the hell out of her." *Id.*

As part of the Judgment of Divorce, issued October 24, 1988, the court issued a permanent injunction, to remain in effect until April 9, 2005, ordering Mr. Lewis to desist and refrain from "assaulting, beating, molesting or wounding" Ms. Lewis or entering onto her premises. Mr. Lewis was granted the right to only supervised visitation with his son Christopher.

REASONS WHY THE PETITIONS SHOULD BE DENIED

The Petitions should be denied because they fail to establish any of the factors that weigh in favor of review on a writ of certiorari: This Court's prior decisions are dispositive, the Michigan Court of Appeals properly applied those decisions, and no conflict exists among state or federal appellate courts as to the proper disposition of petitioners' claims. *See* Sup. Ct. R. 17. In attempting to argue to the contrary, petitioners misrepresent the facts of this case and grossly distort this Court's decisions upholding reproductive freedom and the right to privacy. As

every appellate court has recognized, *Roe v. Wade* and its progeny clearly protect the right of every adult woman, including respondent, to choose to terminate her pregnancy prior to viability.

I. THIS COURT'S PRIOR DECISIONS UPHOLDING WOMEN'S REPRODUCTIVE FREEDOM ARE DISPOSITIVE AND WERE PROPERLY APPLIED BY THE MICHIGAN COURT OF APPEALS.

A. A Woman's Constitutional Right To Decide Whether To Terminate Her Pregnancy Is Not Contingent Upon A Showing That The Abortion Is Medically Necessary

The Michigan Court of Appeals properly dissolved the trial court's injunction, finding that "the injunction interferes with plaintiff's constitutional rights as set forth by the United States Supreme court in *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*." App. 3a (citations omitted).

Petitioners seek review of the Michigan Court of Appeals' decision on the entirely frivolous ground that "the [privacy] right extends only to abortions which are medically necessary for the well-being of the mother in the sound medical judgment of the attending physician."[7] Myers Pet. at 10; *see also* Lewis Pet. at 10. This distortion of the liberty-based privacy right is directly contradicted by this Court's decisions.

In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court held that a woman has a constitutional right to decide whether to have an abortion: The "right of privacy . . . founded in the Fourteenth Amendment's concept of personal

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7 Petitioners are not clear about how they would define medical necessity. This Court has construed the concept of necessity very broadly in *Doe v. Bolton*, 410 U.S. 179, 192 (1973), as including "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." The note from Dr. Stoker relied on by petitioners, however, did not purport to consider all of these factors. In any event, petitioners' interpretation would allow the opinion of a single physician to defeat a woman's right to choose abortion and apparently would impose on a woman "an initial evidentiary burden" to establish that an abortion was medically necessary. Myers Pet. 18. This interpretation in clearly incorrect.

liberty and restrictions upon state action . . . is broad enough to encompass a *woman's* decision whether or not to terminate her pregnancy." *Id.* at 153 (emphasis added). Since *Roe* the Court has consistently and unequivocally reaffirmed the right in numerous decisions. *See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976). Thus, as the Michigan Court of Appeals found, this Court's decisions in *Roe* and its progeny are dispositive.

Even a cursory reading of *Roe* makes absolutely clear the absurdity of petitioners' claim that a woman has no right to choose to have an abortion unless she demonstrates that an abortion is necessary to preserve some narrow definition of her health. In *Roe* this Court catalogued some of the severe physical, emotional and life-altering harms that the state would inflict on a woman by forcing her to bear an unwanted child:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

410 U.S. at 153. Justice Douglas in his concurrence elaborated on the ways in which an involuntary pregnancy and childbirth would require a woman "to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forego the satisfactions of careers; to tax further mental and physical health in providing child care." *Id.* at 214-15. Depriving a woman of her right to control her body would rob her of her ability to shape her own life and pursue her chosen goals and dreams. In addition to these considerations which

may go beyond ones considered purely "medical," the Court in *Roe* implicitly recognized that there would always be a sufficient medical indication for abortion in the first trimester: that it is always safer than continued childbirth and pregnancy.[8]

Petitioners misleadingly string together quotations taken out of context from this Court's decisions that refer to a woman's "attending physician" and the physician's "medical judgment." Petitioners argue that because the Court has acknowledged that "medical judgment" is involved in the abortion decision, only some undefined but narrow class of medically necessary abortions is protected. This reasoning is absurd. Certainly, an abortion is a medical procedure requiring "medical judgment," as does any medical treatment. Thus, the Court's references are not surprising. This in no way means, however, that a woman's right to choose to have an abortion is contingent on a physician's determination that continuing a pregnancy would endanger the woman's health. Rather, the Court's references to the physicians' involvement is aimed at ensuring that a woman's decision to terminate her pregnancy is effectuated by "medically competent personnel." *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975).

If petitioners were correct, a single physician who is personally opposed to all abortions would have the power to deny a woman her right to choose to have an abortion by stating it was not medically necessary. This indefensible interpretation is in direct conflict with this Court's statement that the role of a physician in a woman's abortion decision, as in any medical decision, is to use his or her medical training to assist the woman in making an informed choice:

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8 Abortion, particularly early abortion, is safer than continued pregnancy and child birth. In terms of mortality, "abortion through the 15th week of pregnancy is at least tenfold safer than childbearing." Cates, Smith, Rochat & Grimes, *Mortality From Abortion and Childbirth, Are the Statistics Biased*, 248 J. A.M.A. 192, 196 (1982). "Moreover, the risk of death from legal induced abortion is no higher at any point in gestation than is the risk of death from childbearing." Tietze & Henshaw, *Induced Abortion: A World Review* 110 (1986) (The Alan Guttmacher Institute). Finally, "[e]xamination of the data on which mortality rates for legally induced abortion and childbearing are calculated indicates the comparisons overestimate the abortion risks." Cates, *supra*, at 196.

> The Court also has recognized, because abortion is a medical procedure, that the full vindication of *the woman's fundamental right* necessarily requires that her physician be given "the room he needs to make his best medical judgment." *Doe v. Bolton*, *Roe*, 410 U.S. 179 (1973). See *Whalen v. Roe*, 429 U.S. 589 (1977). The physician's exercise of this medical judgment encompasses both assisting the woman in the decisionmaking process and implementing *her* decision should *she* choose abortion.

City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 427 (1983) (emphasis added).[9]

Finding that "the rights of the pregnant woman" to make the abortion decision are fundamental, the Court held that a state may interfere with that decision only to the extent necessary to further "compelling" interests asserted by the state. *Roe*, 410 U.S. at 162-63. Contrary to petitioners' complete distortion of *Roe*, the Court further held that the state may require a showing of medical necessity *only* if the state has a compelling interest supporting that restriction; this occurs at viability when the state's interest in the potentiality of the fetus becomes compelling. *Id.* at 163-64 (after viability, state may "go so far as to proscribe abortion . . . except when it is necessary to preserve the life or health of the mother").

Petitioners have not even attempted to argue (nor could they) that there existed a compelling state interest sufficient to justify depriving Ms. Lewis of her constitutional right to choose to have an abortion. Thus, petitioners' requests for a writ of certiorari must be rejected.

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9 Similarly, as this Court stated:

> Nothing in [*Doe v. Bolton*, 410 U.S. 179 (1973)] suggests that a doctor's right to administer medical care has any greater strength than his patient's right to receive such care. The constitutional right vindicated in *Doe* was the right of a *pregnant woman* to decide whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion procedures were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision.

Whalen v. Roe, 429 U.S. 589, 604 n. 33 (1977) (emphasis added).

II. PETITIONERS' "QUESTIONS PRESENTED" ARE NOT PROPERLY RAISED BY THE FACTS OF THIS CASE BECAUSE NO DETERMINATION WAS MADE BY MS. LEWIS' ATTENDING PHYSICIAN THAT AN ABORTION WAS NOT MEDICALLY NECESSARY

Petitioners contend that this case presents the question whether the right to privacy protects the decision to have an abortion where the woman's attending physician has determined that the abortion is not necessary for the woman's well-being. That question is not presented by this case. Petitioners rely on what they describe as a "concession" by counsel for Ms. Lewis and a one-sentence note apparently written by Dr. John Stoker which states "It is a social decision not a medical decision for a t.o.p. with this patient." Myers App. 20a. Petitioner Myers admitted that "[t]his concession by counsel for [Ms. Lewis] is the hinge on which this case turns." Myers App. 18a. However, Ms. Linda Pylypiw, trial counsel for Ms. Lewis, never conceded that an abortion was not medically necessary, and Dr. Stoker was not Ms. Lewis' attending physician in connection with this pregnancy. App. 21a. The record contains no support for petitioners' assertions to the contrary, the trial court made no such findings, and any such findings would be clearly erroneous.

Dr. Stoker was Ms. Lewis' physician in her first pregnancy. Dr. Stoker never physically examined her in connection with this second pregnancy. Despite his lack of information upon which to make a medical determination, Dr. Stoker apparently wrote two conflicting statements about medical indications for Ms. Lewis' abortion. In addition to the note to Mr. Lewis, Dr. Stoker wrote a second contradictory note stating that an abortion was medically necessary to preserve Ms. Lewis' health. "Shawn Lewis had a difficult time with her first pregnancy on the date of 04/09/87 and she cannot handle the stress at this time." App. 19a.

It has not yet been determined why Dr. Stoker wrote these conflicting notes without a proper medical evaluation or examination and why he released confidential information without Ms. Lewis' consent. The Genesee County Osteopathic Medical

Association is currently considering a complaint filed by Ms. Lewis against Dr. Stoker for his unprofessional, unethical and possibly illegal behavior in this matter. Ms. Lewis is requesting that Dr. Stoker be ordered to retract his statements and correct his misrepresentations to the state courts and to this Court.

III. AS THIS COURT'S DECISIONS MAKE CLEAR, THE DECISION OF THE MICHIGAN COURT OF APPEALS DOES NOT CONFLICT WITH ANY COMPELLING INTEREST ASSERTED BY THE STATE OF MICHIGAN OR ANY FEDERAL RIGHT ASSERTED BY PETITIONERS.

Petitioners' failure to assert a compelling state interest is fatal because a compelling interest is essential to justify any state interference with Ms. Lewis' abortion decision. Petitioners make only the legally insufficient claim that the state and Mr. Lewis have legitimate interests that weigh against Ms. Lewis' having an abortion. Even this extremely limited claim proves false: No Michigan statute purports to protect the interests petitioners assert; the state of Michigan has taken no part in this case; and petitioners possess no federal rights that are implicated by Ms. Lewis' decision to have an abortion. Even if petitioners had asserted legitimate interests, those interests could not defeat Ms. Lewis' constitutional rights. Moreover, if petitioners had applied the correct legal standard, they could not have established the existence of a compelling state interest to justify forcing Ms. Lewis to continue her pregnancy and to give birth against her will.

A. A Man Does Not Have A Constitutional Right To Interfere With A Woman's Decision To Have An Abortion.

In 1976 this Court decided the precise issue presented here; the Court unequivocally declared that a woman's right to end an unwanted pregnancy may not be infringed on the basis of her husband's objections. *See Danforth*, 428 U.S. at 69-71. The Court struck down a Missouri law that prohibited a married

woman from having an abortion without her husband's consent. *Id.*

Mr. Lewis argues that *Danforth* is not dispositive because it involved a state statute giving all men the right to veto their wives' abortion decisions, whereas Mr. Lewis "seeks a judicial consideration of competing rights and interests, based on the facts of each case." Lewis Pet. 8. This suggested distinction is insignificant. As the Court recognized in *Danforth*, "The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail." *Id.* at 71. Mr. Lewis quite definitely seeks the creation of a right that would allow a man to use the courts to veto a woman's decision to have an abortion. Whether imposed by court order on a case-by-case basis or by state statute, the deprivation of a woman's constitutional right is equally complete and the harm resulting from a court-ordered pregnancy and childbirth equally devastating.

Moreover, this Court has already done the balancing of interests sought by Mr. Lewis. The Court in *Danforth* expressly considered "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying." *Id.* at 69. Nevertheless, the Court concluded that a woman's right to make the abortion decision outweighs her husband's interests in each and every case: "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, *the balance weighs in her favor.*" *Id.* at 71 (emphasis added).

Roe and its progeny make clear that a case-by-case judicial inquiry into a woman's abortion decision would itself be unconstitutional. *Cf. Thornburgh*, 476 U.S. at 766 (quoting *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring)) ("It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties."); *Doe v. Bolton*, 410 U.S. at 195-98 (abortion decision may not be subject to *ad hoc* determinations of hospital committee). An individual woman's personal circumstances are legally irrelevant. Recognizing the unparalleled importance of a

woman's right to control her reproductive capabilities, the Court has declared that every adult woman has the right to decide to have an abortion and to effectuate that decision without government interference, regardless of her very personal reasons and without having to reveal those reasons.[10]

1. The Fourteenth Amendment Affords Individuals Protection Only From State Action And Does Not Apply to Wholly Private Acts Such As A Woman's Choosing An Abortion.

Even absent *Danforth* and the Court's other dispositive abortion cases Mr. Lewis could not prevail. His assertion that Ms. Lewis' abortion decision implicates his constitutional rights is frivolous. The federal constitutional rights cited by Mr.

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10 Faced with having to explain to a court their reasons for choosing abortion and having to expose intimate details of their lives to judicial and public scrutiny, some women would instead resort to unsafe, illegal abortions, despite the great risks to their health and lives. Although a private abortion is a legal and constitutionally protected choice, some women nevertheless have illegal abortions. A study of the seventeen deaths following illegal abortions reported in the United States between 1975 and 1979 revealed that "[a] desire for secrecy was the primary reason four women sought illegal abortions and was a secondary factor for five others." Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Family Planning Perspectives 163, 165 (May/June 1982). Given that nine of seventeen women lost their lives due to a desire to keep their abortions secret during a time when their privacy was protected, that number inevitably would be far greater if Mr. Lewis' "case-by-case" review were lawful.

Moreover, the purely voluntary role that men play in women's abortion decisions would likely be hurt under Mr. Lewis' approach. The vast majority of women who have abortions inform the man involved. Plutzer & Ryan, *Notifying Husbands About An Abortion: An Empirical Look at Constitutional and Policy Dilemmas*, 71 Sociology and Social Research 183 (Apr. 1987). A study of 2,337 women seeking abortions at a clinic in St. Louis, Missouri revealed that 89.5% of the women had told the man involved about the pregnancy, and 92.8% of the married women had told their husbands. *Id.* at 185. If a man had the right to seek a court order prohibiting a woman from obtaining an abortion, a woman considering abortion would be discouraged from telling the man involved. The result could be that far fewer men would have any opportunity at all to be involved in women's abortion decisions.

Lewis—the right to procreate, rights derived from a marital relationship, and the right to raise one's children—protect a person only from *governmental* action and not the wholly private acts of individuals.[11] *Every* case cited by Mr. Lewis as support for his constitutional claims involves government action affirmatively interfering with the autonomy of private individuals.[12] This is not such a case.

For example, the Constitution certainly protects Mr. Lewis' right to be free from government intrusion in his decision to have a child. But it is up to Mr. Lewis, not lower court judges, to find a woman who will have a child with him. No individual, male or female, has a constitutional right to have a court compel another to procreate with him or her. To the contrary, the Constitution guarantees that the government will not interfere with the reproductive choices made by any individual.

Justice Stevens noted this fundamental flaw in Mr. Lewis' claim when he denied an application for an injunction in a legally and factually similar case, *John Doe v. Jane Smith*, 108 S. Ct. 2136 (1988). Justice Stevens wrote "I have serious doubts concerning the availability of a federal remedy for this claim in view of the fact that Jane Smith's decision to obtain an abortion can be carried out without any action on the part of the

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11 "The first section of the 14th Amendment . . . is prohibitory in its character, and prohibitory upon the States. . . . It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment." *Civil Rights Cases*, 109 U.S. 3, 9-12 (1883); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982).

12 *See Rivera v. Minnich*, 107 S. Ct. 3001 (1987) (*state* may use preponderance of evidence standard in paternity proceeding); *Santosky v. Kramer*, 455 U.S. 745 (1982) (*state* may not sever parental rights absent clear and convincing evidence of grounds for termination); *Caban v. Mohammed*, 441 U.S. 380 (1979) (*state* may not practice sex discrimination in adoption proceedings); *Stanley v. Illinois*, 405 U.S. 645 (1972) (*state* may not sever parental rights based on father's unmarried status); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (*state* may not prohibit sale of contraceptives to married individuals); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (*state* may restrict public sale of merchandise by minors, including sale of religious publications); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (*state* may not sterilize persons convicted of crimes).

State of Indiana or any other state governmental subdivision." *Id.* at 2137.

The constitutional rights asserted by Mr. Lewis act only as "a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens." *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128, 132 (1974). The court in *Doe* rejected a request by a man to enjoin his wife's abortion, concluding "[w]e find no basis for the husband's assertion that the Constitution enables him to summon the Commonwealth to help him in a dispute with his wife." *Id.* Mr. Lewis improperly seeks to twist constitutional shields designed to protect individuals from government intrusion, into swords of government coercion in the form of judicial action to subordinate women to the wills of their husbands.

a. Right To Procreate

The implications of Mr. Lewis' distortion of the right to procreate are staggering: In effect he claims that the right to procreate entitles a man to invoke the power of the government to compel a woman to bear his child. If he is correct, courts could order unwilling individuals to engage in uncontracepted sex with spouses or lovers desirous of having children. Or, an individual whose sexual partner did not wish to have a child could be compelled to use contraception during sex. The Supreme Judicial Court of Massachusetts outlined the insidious implications of judicial intervention in refusing to issue an injunction similar to the one requested by Mr. Lewis:

> [W]e would not order either a husband or a wife to do what is necessary to conceive a child or to prevent contraception, any more than we would order either party to do what is necessary to make the other happy. We think the same considerations prevent us from forbidding the wife to do what is necessary to bring about or prevent birth . . . . Some things must be left to private agreement.

Doe v. Doe, 365 Mass. 556, 314 N.E.2d 128, 132 (1974).

Given the constitutional right not to procreate, a man who did not want a child would even have the right to seek a court order forcing a woman to submit to an unwanted abortion:

> If we were to conclude that a putative father has the standing to *prevent* the natural mother from terminating the pregnancy would the putative father have the corresponding standing to *compel* the termination of the pregnancy . . . ? Could a potential putative father (or for that matter a husband) seek an injunction to restrain the woman from using contraceptives or compel the woman to bear children? Such circumstances would seem ludicrous . . . and it would be beyond the province of logic and reason to suggest that she could be compelled to procreate.

Jones v. Smith, 278 So.2d 339, 344 (Fla. App. 1973) (emphasis in original) (court refused to enjoin woman from having abortion opposed by man claiming responsibility for pregnancy, despite man's expressed desire to marry woman and assume responsibility for child), *cert. denied*, 415 U.S. 958 (1974). If Mr. Lewis' flawed analysis were accepted the federal courts would be faced with the impossible task of resolving countless disputes involving abortion, sterilization, and the use of birth control, between spouses and lovers unable to agree about whether to have a child.

b. Rights Derived From Marriage

Mr. Lewis asserts that "his status as a husband in the family unit" confers upon him a "marital right of privacy." Lewis Pet. 13. Mr. Lewis seems to be arguing that the privacy right inheres in the marital couple, rather than in the husband and wife as individuals. This view was rejected in *Danforth* and also runs counter to the basic principle that the privacy right protects individuals only from *government* action. Moreover, in *Eisenstadt v. Baird*, the Court expressly rejected the notion that the marital couple is a separate independent entity, and instead recognized marriage as "an association of two individuals each with separate intellectual and emotional makeup." 405 U.S. 438, 453 (1972) (unmarried individuals have constitutional right

to use contraceptives); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977) ("*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.").

Mr. Lewis' assertion of rights "inherent in his status as a husband," Pet. 13, amount to a claim that a man has the right to use the power of the state to subjugate his wife's will to his own. This outdated view of the marital relationship is inconsistent with this Court's condemnation of our country's "long and unfortunate history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). Since 1973, the Supreme Court has recognized that unimpeded access to safe legal abortion services is essential to women's capacity to live as free, equal and autonomous citizens. *See Roe*, 410 U.S. 113. Most recently, the Court reiterated this principle in *Thornburgh*:

> Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond reach of government . . . *That promise extends to women as well as to men.* Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty *that our law guarantees equally to all.*

476 U.S. at 772 (citations omitted; emphasis added). Stripping women of control of their reproductive capacity, and giving that control to their husbands, would condemn women to a continued existence as unequal and subordinate members of our society.

c. The Right To Raise One's Children

Mr. Lewis' reliance on the constitutional right of fathers to "the care, custody, control, and companionship of his children," Pet. 12, is entirely irrelevant to Ms. Lewis' decision to have an abortion. Certainly, fathers as well as mothers have constitutional rights (again, assertable only against government action) vis-a-vis their children. Yet those rights are not in any way implicated here because this case involves neither a child nor a father. Rather, the issue here is whether a man can force a woman to bear a child and become a mother against her wishes in order to satisfy his desire to have a child.

Mr. Lewis' alleged "paternal rights" are based on a theory that human life begins at conception, so that a fetus is a "child" and a man who has fertilized a woman's ovum is a "father." Yet the Court in *Roe* rejected precisely this effort to enshrine a particular theory of life as state law. *See Roe v. Wade*, 410 U.S. at 159-62; *see also Akron*, 462 U.S. at 444 ("a State may not adopt one theory of when life begins to justify its regulation of abortions"). The state of Michigan has not adopted as law Mr. Lewis' theory of when life begins, but even if it had, such a law would plainly be unconstitutional and thus unavailable to Mr. Lewis to support his claims.

B. The State of Michigan Has Not Asserted A Compelling Interest In Fetal Life In Order To Deprive Women Of Their Right To Choose Abortion.

The trial court treated this case as a controversy about the rights of a child whose parents are involved in a divorce proceeding, and found its legal authority for issuing the injunction prohibiting Ms. Lewis from terminating her pregnancy in the Child Custody Act of 1970 and the state divorce statute provisions for the care, custody, and support of minor children.[13] Declaring that "there is a wide open view as to what constitutes

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13 The court also relied on Michigan Rules of Court, Rule 3.204(a)(4) requiring that a complaint for divorce contain information "that the female party is pregnant, if she is." Myers App. 10a. The trial court erroneously

a child," the court made a radical departure from judicial precedent, and defined the term to include all fetuses.[14] Myers App. 16a. The court, blatantly disregarding this Court's precedent, then granted the fetus an absolute right to be born, holding, in effect, that by participating in a divorce proceeding, a woman waives her constitutional right to terminate her pregnancy.

The only precedent the court cited for this proposition, *Tyler v. Tyler*, 348 Mich. 169, 82 N.W.2d 448 (1957), held that a court could re-open a divorce decree to provide for the maintenance and support of a child conceived during marriage, but not yet born at the time of the divorce. *Id.* at 172. The court was protecting a property interest that was contingent upon the birth of a child, an interest that is entirely consistent with upholding a woman's right to choose abortion.[15] When the court issued the injunction prohibiting Ms. Lewis from terminating her pregnancy, it was not exercising its jurisdiction over a minor child, nor was it protecting the property rights of a future child; it was seeking to force a pregnant woman to bear a child against her will.

Mr. Myers, in his petition for certiorari, completely abandons the trial court's analysis and supplies an alternative, though equally flawed, legal theory. He argues that the trial court's injunction is supported by two state interests: (1) the

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assumed that this requirement anticipates the court's intervention in the woman's pregnancy. Myers App. 16a-17a. In fact, such information is relevant to a divorce proceeding only because it is the duty of the court to ensure that a child born subsequent to the dissolution is provided for in terms of support, maintenance, and custody.

14 Nowhere in the definition section of the Child Custody Act of 1970, Mich. Comp. Laws Ann. § 722.22(2)(a) (West Supp. 1988) is a fetus included in the definition of a minor child. In fact, the very nature of the factors that a court must consider under the Child Custody Act, when applied to a fetus, demonstrate that a fetus was not within the contemplation of the drafters of the legislation. *Id.* § 722.23. Moreover, a court is precluded from defining all fetuses, and particularly those in the first trimester of development, as children.

15 The property right was contingent upon live birth, for if the child were not born alive, no right to support would accrue. *See Toth v. Goree*, 65 Mich. App. 296, 237 N.W.2d 297, 305 (1975) (Maher, J., dissenting).

state of Michigan's interest in protecting fetal life; and (2) Michigan's public policy of encouraging childbirth over abortion.

Mr. Myers' arguments must fail because, as this Court has held, whatever interest the state of Michigan has recognized in fetal life, this interest does not justify interfering with a woman's right to life and liberty, including her fundamental right to terminate a pregnancy prior to viability. In *Roe v. Wade* this Court stated quite clearly that "we do not agree that, by adopting one theory of life, [a state] may override the rights of the pregnant woman that are at stake." 410 U.S. at 162.

In addition, the state of Michigan has not asserted any interest in the fetus that is implicated by this case. No Michigan statute seeks to prohibit first trimester abortions and the state has taken no part in this case. Yet Mr. Myers argues that Michigan has asserted an interest in protecting fetal life at the expense of the rights of a woman who chooses to have an abortion. Mr. Myers relies on a case that held the estate of an eight-month-old viable fetus was eligible to recover under the state's wrongful death statute. *O'Neil v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971). This reliance on *O'Neil* is both misleading and duplicitous. Permitting recovery for the wrongful death of a fetus does not conflict with the rights of the pregnant woman; rather, it protects the woman's interests by compensating her for the loss of her expected child.[16] Moreover, Ms. Lewis was in her first trimester of pregnancy and the Michigan Supreme Court has unequivocally held that a nonviable fetus is not a "person" within the wrongful death act. *Toth v. Goree*, 65 Mich. App. 296, 237 N.W.2d 297, 302 (1975). Mr. Myers cites this case in his petition but does not disclose its holding. Myers Pet. at 23, n.12.

Mr. Myers also inaccurately claims that Michigan has adopted a public policy of preferring childbirth over abortion

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16 This Court addressed the subject of fetal status under wrongful death statutes in *Roe*: "In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life." 410 U.S. at 162 (footnote omitted).

through the recent passage of a statutory amendment proscribing the use of public funds to finance abortions.[17] Even if this were true, it would in no way imply that the state had expressed an interest in ensuring that fetuses are born at the expense of a woman's constitutional right to choose abortion. In fact, this Court expressly held that declining to fund abortion is entirely distinct from prohibiting abortion. *See Harris v. McRae*, 448 U.S. 297, 316 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

The state has a compelling interest in preserving and protecting the lives and health of pregnant women and protecting the constitutional rights of its citizens. *See Roe*, 410 U.S. at 162. There is no reason to assume that a state would seek to promote fetal interests where the very rights to life and liberty, including the right to terminate an unwanted pregnancy, were threatened.

IV. THE MICHIGAN COURT OF APPEALS DECISION IS CONSISTENT WITH THE DECISIONS OF EVERY APPELLATE COURT TO CONSIDER THE ISSUE

Mr. Lewis alludes to the fact that since 1973 there have been "well over two hundred and fifty abortion cases in lower federal courts." Lewis Pet. 17. Yet neither petitioner cites a single case by any court, federal or state, appellate or trial, to support their frivolous argument that this Court's decisions hold that only certain, undefined abortions are constitutionally protected. To respondent's knowledge, no court has ever adopted this distorted interpretation of *Roe* and its progeny. To the contrary, courts have uniformly recognized the right of every adult woman to decide to have an abortion.

Moreover, every appellate court to consider the issue has held that a man does not have the right to a court order enjoining a woman from exercising her abortion right. This has been true in cases both where the man seeking the court order was the

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17 Michigan has provided, and is currently providing, public funds for abortion. In 1987 the state legislature approved a bill banning Medicaid-paid elective abortions. However, the law was almost immediately suspended by the filing of petitions demanding a voter referendum. Letter from Attorney General Frank Kelly to Social Services Director C. Patrick Babcock (Mar. 28, 1988). Voters will decide whether the new law will go into effect during the general election in November, 1988.

woman's husband, *Conn v. Conn*, 526 N.E.2d 958 (Ind. 1988), *applications for stay denied*, No. A-88-55 (U.S. July 22, 1988) (letter from the Clerk of the Court), *petition for cert. filed*, 57 U.S.L.W. 3186 (U.S. Sept. 23, 1988) (No. 88-347); *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115 (1984); *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128 (1974), as well as where the man was not the woman's husband but claimed to be responsible for the woman's pregnancy, *John Doe v. Jane Smith*, 527 N.E.2d 177 (Ind. 1988), *applications for stay denied*, 108 S. Ct. 2136 (1988) (Stevens, J., in chambers), No. A-88-55 (U.S. July 22, 1988) (White, J.) (letter from Clerk of the Court); *Jane Doe v. John Smith*, No. 84A01-8804-CV-00112, slip op. (Ind. Ct. App. Oct. 24, 1988); *Jones v. Smith*, 278 So.2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974). *See also Przybyla v. Przybyla*, 87 Wis.2d 441, 275 N.W.2d 112 (Wis. Ct. App. 1978) (woman's exercise of right to terminate her pregnancy without consent of husband cannot support recovery by husband for intentional infliction of emotional distress). Courts consistently denied such requests even prior to *Danforth*:

> "[*Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973)] make crystalline . . . that a woman in the first trimester of pregnancy, in consultation with her physician, may elect to terminate the pregnancy, and neither the state nor the woman's spouse nor the father of the child has any right to intervene so as to prevent her decision from becoming fact."

Coleman, 471 A.2d at 1119; *see also Doe*, 314 N.E.2d 128; *Jones*, 278 So. 2d 339.

V. NO REASON EXISTS FOR THIS COURT TO TAKE THE EXTRAORDINARY STEP OF RECONSIDERING ITS WELL-ESTABLISHED AND UNBROKEN PRECEDENT RECOGNIZING A WOMAN'S RIGHT TO END AN UNWANTED PREGNANCY.

Petitioners' arguments are so wholly without merit that petitioners are left to argue that this Court should reconsider its decision in *Roe v. Wade*, 410 U.S. 113. This request, which

would be extraordinary in any case, is ludicrous here because petitioners would not prevail even if a woman's right to choose abortion were not constitutionally protected. As explained above, the state of Michigan has not asserted any interest in stopping Ms. Lewis from obtaining an abortion, nor have petitioners established any state action interfering with any rights of Mr. Lewis.

There is no valid reason to ignore the principle of *stare decisis* by reconsidering *Roe*. Petitioners' arguments require overruling, not merely "reconsidering," *Roe* as well as fifteen years of Supreme Court precedent reaffirming a woman's constitutional right to choose abortion. Overruling *Roe* and its progeny would also cast serious doubt on a long series of landmark Supreme Court rulings recognizing the right to privacy that spans back at least to 1923. As the Court made clear, *Roe* was a natural outgrowth of a gradual process of evolution involving the recognition of our basic liberties including the liberty to decide for ourselves when and whether to marry, *see Loving v. Virginia*, 388 U.S. 1 (1967), how to raise and educate our children, *see Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and how much of our most personal lives to disclose to the world, *see Katz v. United States*, 389 U.S. 347 (1967), as well as the right to decide whether to conceive or bear children, *see Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965).[18]

In support of their request, petitioners offer a variety of arguments, all founded on the premise that we know more now about abortion than we did in 1973 and that the purported "advances" in legal scholarship, scientific knowledge, and understanding of the social implications of abortion since then justify rejecting *Roe*.

The petitioners' premise is false. Henry Wade, District Attorney of Dallas County in 1973, argued extensively in his brief in *Roe* that "modern science—embryology, fetology, genetics,

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18 The Court noted in *Roe*, 410 U.S. at 152, that it had recognized the right to privacy as far back as 1891. *See Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891). The Court wrote in *Botsford* that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person."

perinatology, all of biology—establishes the humanity of the unborn child." Brief for Appellee at 31, *Roe*, 410 U.S. 113. The brief cited literally dozens of scientific articles and included photographs of fetuses at forty days, six weeks, nine weeks, ten weeks, twelve weeks, sixteen weeks, seventeen weeks, and eighteen weeks. *Id.* at 35-51.[19] In addition, Wade cited extensive caselaw in support of his claim that the fetus should be treated as a "person" under the law. This Court carefully considered and deliberately rejected these arguments. *Roe*, 410 U.S. at 156-162.

Moreover, petitioners could not argue, indeed do not argue, that we know more now than in 1986, when the Court upheld the right to choose abortion in *Thornburgh*, 476 U.S. 747, or in 1983 when it decided *Akron*, 462 U.S. 416. The same arguments were made and rejected by the Court in these cases. In *Akron*, the Court enumerated the "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*:"

> That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term. The decision was joined by The Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy. *See Connecticut v. Menillo*, 423 U.S. 9 (1975); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Bellotti*

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19 *See also Drama of Life Before Birth*, Life Magazine, Apr. 30, 1965 (showing color photographs, eight years before *Roe*, of fetuses in utero); K. Luker, *Abortion & the Politics of Motherhood* 23-27 (1984) (discussing widespread knowledge of fetal development in the Nineteenth Century and stating that early "[p]opular (and legal) acceptance of abortion was not based on ignorance of 'the facts,' as physicians asserted, but on *a different moral evaluation of the facts*.") (emphasis in original).

v. Baird, 443 U.S. 622 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *H.L. v. Matheson*, 450 U.S. 398 (1981).

462 U.S. at 420 n.1. The petitioners in this case offer no new information and no original rationale for reversing this Court's long-established precedents.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

November 2, 1988

Respectfully submitted,

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National Abortion Rights
Action League
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APPENDIX

TABLE OF CONTENTS

	PAGE
Affidavit of Shawn Lewis, 9-16-88	1a
Attachment: Police Reports Regarding Carlton Lewis	8a
Affidavit of Shawn Lewis, 9-28-88	13a
Complaint Filed with Genesee County Osteopathic Medical Association, 10-19-88	16a
Attachments: Affidavit of Shawn Lewis, October 14, 1988	17a
Letter from Dr. John Stoker	19a
Declaration of Linda Pylypiw, 10-28-88 (original on file with counsel for Respondent)	20a
Criminal Record of Carlton Lewis, 9-28-88	22a
Lewis Says Spouse Threatened Her Life, The Detroit News, Oct. 1, 1988	24a
2 Left Bitter By Abortion, The Detroit News, Oct. 5, 1988	26a

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

CASE NO. 88-158036-DM

JUDGE VALDEMAR WASHINGTON

SHAWN KATHLEEN LEWIS,

Plaintiff

—v.—

CARLTON JAMES LEWIS,

Defendant

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AFFIDAVIT

STATE OF MICHIGAN)
COUNTY OF GENESEE) ss.

NOW COMES Plaintiff-Appellant, SHAWN KATHLEEN LEWIS, and after being duly sworn deposes and says:

I believe I first met my husband in February of 1985. I met him through some friends of ours. A group of about 17 of us all went camping together in northern Michigan in May 1985. We didn't start dating until October 1985.

In December of 1985, he moved into my home; and, we got engaged in February 1986. We were married in July 1986 and we had been married two weeks when I found out that I was three weeks pregnant. From that day on, I was continually ill. I had high blood pressure, high blood sugar, kidney infection (for which they hospitalized me for a week). I was restricted to my bed for three months before I had Christopher, who was born on April 9, 1987. I was unable to take care of my husband or my house; and, my mother had to come in to clean and cook for us.

Carl left three times during the pregnancy for about two weeks each time. Just before Christmas 1986 he left. He said that he couldn't handle it that I couldn't go anywhere or do anything and that I was constantly ill. He went and lived with

his brother; and, at that time, he stated that he did not want the child that I was carrying. I went to his brother's house and begged him to come back.

He left again the end of January or beginning of February 1987. We were fighting because he wanted to go to his cousin's home, someone I didn't approve of because he is a heavy drinker and Carl was influenced by this cousin. I wanted him to stay with me; but, he told me to get out of the car and dropped me off by the overpass at Court Street and Dort Highway. I walked home in the snow, 7 months pregnant, in cowboy boots and a light jacket. I got about three blocks from home after I had walked almost two miles when he sent a friend, Joe Stevens, to pick me up. When I got home, Carl had taken all of his things and moved to his brother's.

I don't remember the specifics of when he left the third time during my pregnance [sic]; however, when Christopher was born in April, when he was 5 weeks old—about May 24th, which is around the time he beat me up (a copy of the police report is attached), he left again. At that time, I was undergoing heart testing because my father had just had open heart surgery for a diseased valve which was hereditary. In addition, I had an infection in my tubes from the pregnancy.

When he left that time, both Carl and his mother threatened to take Christopher away from me. I was in the phone booth at the hospital talking to Carl on the phone when his mother got on the phone and said they were going to get a lawyer to take the baby away from me. I was at the hospital visiting my father.

At that time we had been fighting a lot because I didn't want to let his mother take care of Christopher. Each time I let her take him, she wouldn't feed him every three hours as directed and he returned with diaper rash because of her not changing his messy diapers. Each time I let her take care of Christopher, he was a mess by the time I got back. Carl and I fought because I wanted my mother to watch Christopher but didn't want his mother to.

When Carl left that time, he went to his mother's for at least two weeks. Each time he was gone, he was gone about two weeks—long enough to get a full paycheck and spend it on himself. Then he would come back.

After he came back home, he didn't have a lot of patience with the baby. He never bathed the baby. Once in a while, he'd change a diaper. More or less, Christopher got in the way because we couldn't do things like we had been able to do before Christopher was born. He worked second shift and would want to go out after he got home from work. I couldn't go out because I would have to be up at 6 o'clock in the morning and take care of the baby. We fought a lot about that.

I never left Carl alone with Christopher very often because he would run out of patience and yell. One time when I let [sic] him with Christopher, he let Christopher fall off the couch and badly scratched his head.

Things were better until he left again November 1, 1987. He took our son trick-or-treating the night before and I thought everything was okay. He left and went to his mother's house. The next day he called my parents and told them that he no longer could handle it, that he didn't want the responsibility of Christopher and me, and to find someone else to take care of us. On November 2nd, I went down and filed for ADC.

At that time, the heat bill was at least 2 months behind, the water was to be turned off, and the phone had been turned [sic] because the bills hadn't been paid in a couple of months. He spent the money on his dune buggy. I applied for emergency help for the water, emergency food stamps, and I had to borrow money from my parents for diapers, etc.

In January, the day I filed for divorce and custody of Christopher, the reason I called Mr. Swirtz was because Carl had called and threatened to take Christopher and move down south so I would never see Christopher again.

Carl had a nervous breakdown near the end of February. He had broken into my house (police report attached). Dr. John Stoker treated him with anti-depressants. He was hospitalized but I don't know for how long or where he was hospitalized. I talked with Mr. Swirtz about it. He, in turn, talked to Carl's attorney who denied it. I was concerned about allowing Carl to have Christopher for visitation because of the medication he was on and the alleged drug overdose of prescription pills and cutting his wrists.

After that, we met with Mr. Swirtz and Mr. Moss. At that time, we decided to go to a marriage counselor. We went approximately five times and then Carl wouldn't go anymore. I talked to Mr. Earley over the phone after that; and, he told me that those things often happen when 1 spouse is told that things that happened and his reasons for leaving are not legitimate reasons, and that Carl probably didn't want to acknowledge the problems he was confronted with so he stopped going.

During that time there were more break-ins (police reports attached). On March 6, Carl had broken into the home. I had left the phone book open to where I was. It was his visitation weekend. He dropped Christopher off at a neighbor's house because he didn't want Christopher any more (copy of statement from neighbor is attached). I pulled in the driveway and Carl was sitting out in the street. He said, "Your precious little son is at one of the neighbors' houses."

I went inside the house and called the police. Before they arrived, I wanted [sic] to three different houses to look for Christopher before I found him. I returned to the house and there was broken glass everywhere and the front screen was all bent and ripped. Once I got inside the house, I sat down with Christopher and waited for the police.

While I was waiting, Carl returned and he was standing over me when Policeman Chris Blinkilde arrived. The officer asked me what was happening and he separated Carl and me. I told him I wanted Carl out of the house, that he had broken into the home through the front window. At that point, Carl took a handful of pills out of his pocket and put them into his mouth in front of the officer. The officer handcuffed him, put him in the police car and took him downtown.

Just before Father's Day, I told Carl that he could have visitation on Father's Day; and, on Father's Day morning, Carl called to say that the didn't want Christopher that day. So, I took the baby to my parents' house where we spent the day.

Since then, the break-ins have continued and on July 1st, he refused to pay any additional child support. He didn't pay any support again until September, just before we went to court for the abortion issue.

Since the Circuit Court hearing on the abortion issue, he has continuously harassed me, threatened me. I've had to leave my home because he wouldn't leave us alone. He would call at 1 o'clock in the morning, 5 o'clock in the morning. After I went to stay with my parents in Waterford, he still called long-distance to harass us.

I did inform the Friend of the Court of my leaving town and the reasons. I was concerned with visitation at that time; and, I did talk to Nancy Stockham regarding allowing him visitation. She told me not to worry about letting Carl have visitation. She said that situation was unstable and that I shouldn't worry about the visitation. An investigation was pending. Following that, both Mr. Swirtz and Nancy Stockham went on vacation.

Since then, it has been complete harassment and threats. He has called at least two or three times a day. If he didn't call, he was there in the morning and at night. He would stand outside banging and screaming and yelling and pounding on the windows. The police were usually called. One weekend he did it and three police cars came. They wouldn't do anything because he was just sitting in front of the house. I called Mr. Swirtz (on a Saturday) and he talked to the police officers but they still let him go.

On September 15, 1988, I was gone all day so I left the answering machine on. When my mother and I got home about 5 o'clock, there as a message from Carl; and, he said that if I had done what he thought I had done, he would take Christopher and I would never see him again and, "That's a promise."

At the present time, Carl is staying with his sister, Lynn Lester; his 9-year-old niece, Kandi Lester; and Ken Robertson, his sister's boyfriend. Sometime ago, I was at this house when Kandi came into the room and said to her mother, "Mom, I don't want to smoke a joint with you." Then Kandi went outside and brought in some little green "pods" and asked me if I wanted some "pot". I corrected her and told her they were pods and she said, "No, pot!"

I have received a letter from Carl's mother, Geraldine Lewis, dated May 23, 1987, in which she acknowledged that Lynn

smoked pot and, in Geraldine's opinion, that was no worse than drinking.

I am afraid that Carlton will kidnap Christopher to prevent me from having him and I am afraid to let Christopher go with Carlton for visitation at the home at which Carlton is staying.

I am willing to allow Carlton to have supervised visitation of Christopher; and, we have mutual friends, Bob and Eva Andrews, who live at Myrtle Grove Trailer Park and whose telephone number is 767-2571.

Further, Deponent sayeth not.

SHAWN KATHLEEN LEWIS
Shawn Kathleen Lewis

STATE OF MICHIGAN)
COUNTY OF GENESEE) ss.

Subscribed and sworn to before me this 16th day of September, A.D., 1988

ANN KAREN WICK
Ann Karen Wick, Notary Public
Genesee County, Michigan
My commission expires: 1-15-92

Prepared by:
ARTHUR C. SWIRTZ P21214
Attorney at Law
702 Church Street
Flint, Michigan 48502
313-235-2929

OFFENSE	CLASS	PIN	PIN	PIN	PIN	OFFENSE NO
ASSAULT	04LD					0016978

COMPLAINANT NAME	SX	AC	AGE	ST NO	STREET NAME	CITY	PHONE
LEWIS, SHAWN			23	3235	CHURCHILL AV		7361671

REPORTED BY	SX	AC	AGE	ST NO	STREET NAME	CITY	PHONE
LEWIS, SHAWN			23	3235	CHURCHILL AV	W	7361671

REPORTED TO	REPORTED PER	RCPT HOW	DATE	TIME	OCCURRED	DATE TIME	RPT	DISP	SUS	ARR
DURBIN COMPL	CX		05/24/2002		05/24/2002 1200	05/24/2002 1200	Y	N	Y	

ST NO	LOCATION OCCURRED	ESC MEANS	FROM	WEAPON/TOOL	RP INFA	P PTRL	DIST
3235	CHURCHILL AV			05/24/2002 1200			

VEHICLE MAKE	CODE	YEAR	BODY	MODEL	TOP	COLOR	BTM	LIC NO	YR	STATE	LOCKED VEH	LOCKED IG
											YES NO	YES

VIN

DIST FEATURE

INFO FROM

COMPL STATES THAT HER HUSBAND WHO MOVED OUT A WEEK AGO CAME OVER AND STARTED A FIGHT WITH COMPL. SUBJ HIT COMPL ON BOTHS ARMS AND LEFT SIDE. SUBJ THEN PUSH COMPL THRU THE SCREEN DOOR. SUBJ THEN LEFT.

MDOP 14 0004753

COMPLAINANT NAME	SX	RC	AGE	ST NO	STREET NAME	CITY	PHONE
LEWIS, SHAWN	F	W	24	3235	CHURCHILL AV		7360982
LEWIS, SHAWN	F	W	24	3235	CHURCHILL AV		7360982

HUSBAND SAME REPORTED PER TX REPT HOW 0215 88 1400 TIME 0215 88 1400 0021588 1400 DATE RPT DISP SUS ARR

ST NO 3235 CHURCHILL LOCATION OCCURRED AV ESC MEANS FROM WEAPON/TOOL 0052 0814 0468 TO DIST

VEHICLE MAKE	CODE	YEAR	BODY	MODEL	TOP	COLOR	BTM	LIC NO	YR	STATE	LOCKED VEH YES	LOCKED VEH NO	LOCKED IGN YES	LOCKED IGN NO

VIN DIST FEATURE INFO FROM

RPTS THAT EX-HUSBAND CAME OVER UNINVITED. CPLT WOULD NOT OPEN THE DOOR. SUSP KICKED THE DOOR IN, BREAKING SAME. HAS INS.

THEY ARE IN THE PROCESS OF GETTING A DIVORCE.

OFFENSE	CODE	PH	PH	PH	PH	OFFENSE NO
THREAT	24					0010422

COMPLAINANT NAME	SX	RC	AGE	ST NO	STREET NAME	CITY	PHONE	AM/PM
LEWIS, SHAWN	F	W	24	3235	CHURCHILL		H 7360982	
LEWIS, SHAWN	F	W	24	3235	CHURCHILL		W 7360982	

REPORTED BY	SX	RC	AGE	ST NO	STREET NAME	CITY	PHONE	AM/PM
JONES CMPLT	TX			040688 1425	040688120004068 8 1200		Y N	

REPORTED TO	REPORTED PER	REPT HOW	DATE	TIME OCCURRED	DATE TIME	RPT	DISP	SUS	ARR	WIT
3235 CHURCHILL		AV		FROM	0052 TO 0B14 0402					

ST NO	LOCATION OCCURRED	ESC. MEANS	WEAPON/TOOL	REP AREA	F PTRL	DIST	ENTRY

VEHICLE MAKE	CODE	YEAR	BODY	MODEL	TOP	COLOR	BTM	LIC NO	YR	STATE	LOCKED VEH YES	LOCKED VEH NO	LOCKED IGN YES	LOCKED IGN NO

VIN

DIST. FEATURE

INFO FROM

RPTS HER EX HUSBAND WHO HAS BROKEN INTO HER HOME BEFORE, CALLED THIS AM TO WARN THE CMPLT THAT HE WOULD DO SO AGAIN.

10a

| OFFENSE | CODE | FM | | |

UNLAWFUL ENTRY 05B1 0025092

COMPLAINANT NAME	SX	RC	AGE	ST NO	STREET NAME	CITY	PHONE	AM/PM
LEWIS, SHAWN	F	W	25	3235	CHURCHHILL ST		7360982	
LEWIS, SHAWN	F	W	25	3235	CHURCHHILL ST		7360982	

OFFENSE	REPORTED PER	REPT HOW	DATE	TIME	FROM	TO	RPT	DISP	SUS	ARR	WIT
BURGLARY	TX		08/08/88	1120	08/06/88	08/08/88					

NO	LOCATION OCCURRED	ESC MEANS	WEAPON/TOOL	PREMISE	F PTRL	DIST	ENTR
3235	CHURCHHILL ST						

VEHICLE MAKE	CODE	YEAR	BODY	MODEL	TOP	COLOR	BTM	LIC NO	YR	STATE	LOCKED VEH YES	LOCKED VEH NO	LOCKED IGN YES	LOCKED IGN NO

VIN

DIST FEATURE

INFO FROM

CPLT STS THAT A NEIGHBOR OBSVD HER HUSBAND, WHOM SHE HAS AN INJUNCTION AGAINST HIM, ENTERED HER HOUSE BY TAKING OUT FRONT DOOR GLASS. NOTHING KNOWN MISSING F/INSIDE HER HOUSE. HAS INS

12a

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

CASE NO. 88-158036-DM

JUDGE VALDEMAR WASHINGTON

SHAWN KATHLEEN LEWIS,

Plaintiff

—v.—

CARLTON JAMES LEWIS,

Defendant

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313-235-2929

ACLU FUND OF MICHIGAN by:
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812-238 2421

AFFIDAVIT

STATE OF MICHIGAN)
COUNTY OF GENESEE) ss.

NOW COMES Plaintiff-Appellant, SHAWN KATHLEEN LEWIS, and after being duly sworn deposes and says:

At approximately 12:30 p.m. today, Carl Lewis pulled up in the driveway. I did not hear him pull up. I heard a knock on the door and saw Carl Lewis' truck and immediately dead-bolted the door. I looked out the window. Carl said he wanted to come in and talk to me, and I would not reply. He proceeded to kick the steel door in, and enter my home. He started towards me, and my friend, Julie Murphy, immediately came between us. She grabbed his arm to pull him away, and I went to the other side of the room. He then began accusing me of killing his baby. He asked me if I did kill his baby, and I would not reply. Julie then spoke and said he did not know if that was true. Julie told him to leave, while I called the police. He left before the police arrived.

Further, Deponent sayeth not.

SHAWN KATHLEEN LEWIS

Shawn Kathleen Lewis

STATE OF MICHIGAN)
COUNTY OF GENESEE) ss.

Subscribed and sworn to before me this 28th day of September, A.D., 1988

MICHELLE R. RAMBURG

Michelle R. Ramburg, Notary Public
Genesee County, Michigan
My commission expires: 12-08-91

Prepared by:
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Linda L. Pylypiw
Attorney at Law _____ 720 Church Street
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(313) 234-0980

October 19, 1988

Carol Bowman
Genesee County Osteopathic Medical Association
3921 Beecher Road
Flint, MI 48532

RE: John Stoker, D.O.

Dear Ms. Bowman:

Enclosed please find a copy of the Affidavit that has been filed with the U.S. Supreme Court on my client's behalf. As you can see, it is Ms. Lewis' position that Dr. Stoker released information regarding her without her permission. This information was released with the prior knowledge that the parties were in a hotly contested divorce case regarding Ms. Lewis' wish to terminate her pregnancy. As is evident by the attached statement, Dr. Stoker had already given a written statement to Ms. Lewis indicating that the termination of her pregnancy was warranted for her health. The statement given to Mr. Lewis was directly contradictory to his previous statement and is in error. Both statements were written without a physical examination of Ms. Lewis having been had.

Ms. Lewis' wishes to have this matter investigated regarding Dr. Stoker's breach of the physician-patient privilege. Also, in light of the serious damage that the misdiagnosis has done to Ms. Lewis, she would request that Dr. Stoker be ordered to retract his diagnosis as not being accurate. If you need any further information from my client or me, please feel free to contact me.

Yours truly,

LINDA L. PYLYPIW
Linda L. Pylypiw
Attorney at Law

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988
Case No. 88-555

GENE MYERS, Guardian ad Litem,

Petitioner

—v.—

SHAWN KATHLEEN LEWIS,

Respondent

AFFIDAVIT OF RESPONDENT

NOW COMES the Respondent, herein, SHAWN KATHLEEN LEWIS, being first duly sworn, and says:

1. That your affiant is the respondent herein and the Plaintiff in the original cause of action, an action for divorce filed in Circuit Court for the County of Genesee, State of Michigan, Case #

2. That your affiant has been advised that attached to the Petitioner's Petition for Writ of Certiorari to the Michigan Court of Appeals filed with this Court is a statement from Dr. John Stoker, D.O. Your affiant has been further informed and believes that the statement was given to her estranged husband, Carlton Lewis, for use in the instant case.

3. That Dr. John Stoker was her treating physician for her first pregnancy.

4. That from the date of conception of the fetus at issue here, she has not been treated by Dr. John Stoker regarding her pregnancy. Dr. Stoker has not physically examined her in conjunction with the pregnancy at issue here. Dr. Stoker has only

spoken to your affiant on one occasion regarding this pregnancy.

5. That no release of medical records was signed authorizing release of information to Carlton Lewis, James Bopp, Jr., or anyone acting on their behalf, nor was a release of medical records given orally.

6. That your affiant does not wish to waive the Physician-Patient privilege to allow this information to be divulged.

7. That your affiant has filed a complaint with the governing body that licenses Osteopathic doctors against Dr. John Stoker, D.O., because of this breech of confidentiality.

Your affiant sayeth further not.

Dated: October 14, 1988

SHAWN KATHLEEN LEWIS

Shawn Kathleen Lewis

STATE OF MICHIGAN)
) ss
County of Genesee)

On this 14th day of October, 1988, before me personally appeared the above named SHAWN KATHLEEN LEWIS to me known to be the person named in and who executed the within affidavit and who stated under oath that the contents thereof are true to the best of her information, knowledge and belief.

JUANITA L. KUZAVA

Juanita L. Kuzava
Notary Public, Genesee County, Michigan
My commission expires: October 10, 1989

Prepared by:
LINDA L. PYLYPIW (P29578)

VALLEY MEDICAL CENTER

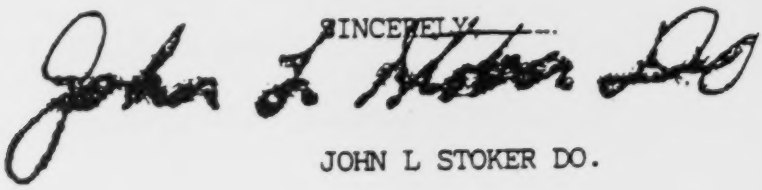
John L. Stoker, D.O., P.C.
G-5142 Miller Road
Flint, Michigan
(313) 733-3660

AUGUST 18,1988

TO WHOM IT MAY CONCERN:

SHAWN LEWIS HAD A DIFFICULT TIME WITH HER FIRST PREGNANCY ON THE DATE OF 04/09/87 AND SHE CANNOT HANDLE THE STRESS AT THIS TIME.

SINCERELY,



JOHN L STOKER DO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988
Case No. 88-555

GENE MYERS, Guardian ad Litem,

Petitioner

—v.—

SHAWN KATHLEEN LEWIS,

Respondent

Case No. 88-____

CARLTON JAMES LEWIS,

Petitioner

—v.—

SHAWN KATHLEEN LEWIS,

Respondent

DECLARATION

1. I have read both the Petition for a Writ of Certiorari filed with the U.S. Supreme Court on behalf of Gene Myers on September 30, 1988 and the Petition for a Writ of Certiorari filed on behalf of Carlton Lewis on October 21, 1988. I submit this declaration to correct serious factual misstatements that appear in both petitions concerning a meeting that occurred in Judge Washington's chambers on August 19, 1988 in connection with this case.

2. To my knowledge, no transcript was made of the August 19th meeting.

3. I was not physically present at the meeting. Steven Moss was present in Judge Washington's chambers and I was contacted by telephone.

4. Both petitions state that during that conversation I conceded that Shawn Lewis' attending physician had made the medical judgement that an abortion was not medically necessary for Ms. Lewis' well-being. I made no such concession. I stated only that I had no medical documentation that an abortion was medically necessary.

5. I also never conceded that Dr. John Stoker was Ms. Lewis' attending physician in connection with this pregnancy, because he was not. Dr. Stoker never physically examined or treated Ms. Lewis in connection with this pregnancy. In addition, Ms. Lewis never consented to the release by Dr. Stoker of information about her medical condition. I have filed, on behalf of Ms. Lewis, a complaint with the Genesee County Osteopathic Medical Association requesting that Dr. Stoker be ordered to retract this diagnosis as inaccurate. Moreover, to the extent Dr. Stoker had information about Ms. Lewis' medical condition the release of such information was a breach of the physician-patient privilege.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 28, 1988

LINDA L. PYLYPIW

Linda L. Pylypiw

C#31565

68th DISTRICT COURT RECORD

(For misdemeanors)

Date 9-28-88 Time 2:01 PM. Officer Villarreal

Name Carlton J. Lewis Address 3073 W. Dayton #28

Offense Unlawful Entry

By Kicking in front door at 3235 Churchill

At 3235 Churchill

HISTORY

Sir:

On 9-28-88 (Wed) while assign to dist B-12, I received radio call to phone Sgt. Simms at the desk. I then called Sgt. Simms, and she informed me to stop by 3235 churchill because Mrs Lewis was having trouble with her ex-husband. At approx. 2:01 pm I stopped by 3235 Churchill when I was met by a f/w later I.D. as Shawn Lewis f/w/25 of 3235 Churchill. Mrs. Lewis then stated that at approx. 12:30 pm today her Husband Carlton J. Lewis came over to her house, at which Shawn locked the door Carlton then knocked several times but was not admitted to the house. At this time Carlton kicked the door opening same, Carlton then entered Shawn house and

CONT.

BUREAU OF IDENTIFICATION

CRIMINAL RECORD

stated to Shawn "HAVE YOU KILLED MY BABY YET, BECAUSE IF YOU DO I'AM GOING TO KILL YOU." At this time Shawn's room mate Julie Murphy f/w/24 grabed and threw Carlton out the door. Carlton then got into his truck and left from this location in unknown direction.

I then talked to Julie Murphy f/w/24 and she stated the same story as Shawn had stated.

Sgt. Simms arrived on the scene at approx. 1:50 pm, and gave the ok for I.B. to come out and take some pictures of the damage to the front door.

Mrs Lewis also stated that Walter Kosiba m/w/ad also witness the unlawful entry, because he was next door working on the house outside. Mr. Korsiba left a card with Mrs Lewis from East Village Construction phone #238-1499, but I have not been able to talk to him

On September 29, 1988 Sgt McManaman talked with Witness Walter Kosiba who stated that on 9-28-88 at approx 12:15A he was working in the area of 3235 Churchill when he observed a Chevrolet pick-up pull up at 3235 Churchill. The driver got out of the truck and ran up to the door. He banged on the door yelling, "You killed my baby". The subject opened the storm door and kicked the inner door with his right foot, gaining entry. Kosiba heard loud screaming and yelling coming from inside the house. The subject exited the house, got back into the truck, and drove away.

Sgt McManaman talked with complainant Shawn Lewis who related that in Nov, 1987 her husband Carlton Lewis, moved out of the home at 3235 Churchill. Due to the fact that he continued to return and break-in, eviction papers were served on her husband in April 1988 by Court Officer William McAuley. Carlton Lewis, upon receiving the papers, returned to the house and removed furniture. He has all of his personal items and clothing out of the house as they were taken out in November when he moved.

THE DETROIT NEWS
Saturday, October 1, 1988

Lewis says spouse threatened her life

Husband in Flint abortion case faces criminal charge
By Jim Mitzelfeld
News Staff Writer

A Flint man who lost a U.S. Supreme Court bid to stop his estranged wife from having an abortion has been accused of threatening to kill her and faces criminal and civil charges as a result.

Shawn Lewis' attorney filed a petition Friday to have her estranged husband, Carlton Lewis, found in contempt of court for violating an April 21 court order barring him from threatening or assaulting her.

AN ARREST WARRANT was signed Thursday charging him with unlawful entry—a misdemeanor—for a Wednesday incident during which he allegedly kicked in the door of his wife's house.

According to a Flint police report, Carlton Lewis barged into the house, demanded to know if she had had the abortion and said, ". . . if you did, I'm going to kill you."

Shawn Lewis was not injured during the confrontation, police said.

Monday, the U.S. Supreme Court refused to overturn a Michigan Appeals Court ruling upholding Shawn Lewis' right to an abortion despite her husband's objections. Her attorneys have refused to say whether she has had an abortion.

Genesee County Circuit Judge Valdemar Washington, who is presiding over the couple's stormy divorce, scheduled a court hearing for Monday to consider Shawn Lewis' charge that Carlton Lewis violated an injunction barring him from threatening her.

NO ARRAIGNMENT date has been set on the criminal charge, however, and police have no plans to look for Lewis because the charge against him is only a misdemeanor, Flint Police Capt. Michael Hanna said.

Arthur Swirtz, Shawn Lewis' divorce attorney, has also asked for a new court order barring Carlton Lewis from Shawn Lewis' Flint home.

Steven Moss, Carlton Lewis' attorney, said he couldn't comment on the alleged threat because he hasn't been able to locate his client.

"The biggest thing I've asked him is don't go over there, don't bother them," Moss said.

"If he did it, I can understand. He's hurting. I understand his grief but that doesn't mean that's the right thing to do.

"I don't know what I would do if that was me. I might beat the hell out of her."

ACCORDING TO court records, Wednesday wasn't the first time Carlton Lewis had threatened his wife with violence. A judge issued a restraining order in April warning him he would be thrown in jail if he tried to hurt his wife.

In court papers filed Friday by her attorney, Shawn Lewis claims Carlton Lewis called her Sept. 15 and ". . . said that if I had done what he thought I had done, he would take Christopher (the couple's son) and I would never see him again."

THE DETROIT NEWS
Wednesday, October 5, 1988

2 left bitter by abortion
Court case, media glare take toll on Flint couple

By Jim Mitzelfeld
News Staff Writer

Shawn Lewis said Tuesday she can understand why her estranged husband went to court to try and stop her from having an abortion, but she still believes getting an abortion was the right thing.

Carlton Lewis said he still has trouble understanding how the judicial system failed him, but said his wife now will have to face a higher authority—God.

"I do understand his side completely. I feel sorry for him," Shawn Lewis said in her first public comments since winning her seven-week court battle to overturn an Aug. 9 injunction barring her from having an abortion.

In an interview on the front steps of her modest, single-story wood-frame home in Flint, Shawn Lewis said she was relieved to finally tell her side of the story that drew national attention and dashed any hopes of saving their stormy marriage.

SHE SAID she has been taking life "one day at a time" and trying to get things back together in the wake of the U.S. Supreme Court ruling last week that cleared the way for her to terminate her 11-week-old pregnancy.

The 24-year-old unemployed mother said she doesn't believe she should have to explain why she wanted an abortion but admitted that the emotional and physical strain of her first pregnancy—which resulted in the birth of the Lewises' son, Christopher—convinced her she never wanted to have more children.

The heavy-set Lewis, whose red hair outlines a freckled, cherubic face, described how her veins collapsed and she was hospitalized for a week with a kidney infection during her first pregnancy. She suffered high blood pressure and a blood-sugar imbalance and was bedridden for the final two months.

Please see Lewis/12A

Lewis
Abortion battle leaves husband, wife both bitter

From page 1A

"I was sick all the way through it," she said.

THE ILLNESS she faced during her first pregnancy "was a big part" of her decision to have an abortion, she said.

She said she was moved to end her silence because there's been "so much garbage that's been printed" about the case. She said she was traumatized by the media coverage, which included television camera crews chasing her out of court.

"It was hard enough. That just made it harder," she said.

Carlton Lewis, broke and bitter about the refusal of the nation's highest court to halt the abortion, said he never will forgive his wife for her decision.

"I COULD tell she felt bad for me. But as far as her concern that she killed a baby, she didn't have any concern for that," he said, recalling his feelings when she admitted to him Sunday that she had gone ahead with the abortion.

"She was kind of callous, like it was never really there. Like it was a growth and a cancer and she just got rid of it."

He said his wife may have won in the courts but eventually will have to answer to a higher authority.

"I believe that there's a heaven and a hell. I guess Shawn better do a lot of praying or she's going to hell," he said.

SHAWN LEWIS said she's not surprised by her husband's angry words, but she said she tried to break the news to him as gently as she could. She denied his assertion that she only had the abortion to get back at him.

"No. Nothing was done to hurt him," she said. "Carl says a lot of things when he's angry. He asked about the abortion and I told him. I think he had a right to know more than anyone else."

Carlton Lewis, a 25-year-old school custodian, said the lengthy court fight left him with $10,000 in legal bills and shattered his faith in the American judicial system and the country.

He said his wife had an unfair advantage in the custody battle over the fetus

because she received the free legal assistance of the American Civil Liberties Union.

He was forced to pay his own attorney fees without any support from abortion opponents, who he labeled "hypocrites" for failing to lend any financial support.

THE ONLY help he's gotten so far, he said, were $70 in contributions from two individuals who read about his plight.

"The worst thing I'm worried about right now is I'm just flat broke. I don't know how I'm going to pay my bills. I don't even have food for myself."

Carlton Lewis said he brings home $180 a week from his job sweeping floors at the Genesee Intermediate School District's Center for the Severely and Physically Handicapped. Out of that, he has to pay $50 a week in child support, and he said he's behind in rent on his mobile home.

The thin, bearded husband talked about the case while sitting on a bench Tuesday in the Flint Police Department awaiting arraignment on a misdemeanor charge stemming from an incident last Wednesday when he allegedly kicked in his wife's door and threatened to kill her.

FLINT DISTRICT Judge Michael McAra accepted his not-guilty plea and released Carlton Lewis on his own recognizance. He faces an Oct. 24 preliminary hearing on one count of unlawful entry. The maximum punishment is 90 days in jail and a $500 fine.

Christopher Lewis denied threatening his wife, but Shawn Lewis said the couple's brief marriage was dotted with violence.

Records on file with Flint Police Department show that Shawn Lewis called the police on six different occasions between May 24, 1987 and Carleton Lewis arrest Tuesday. The complaints included her allegations that he broke into her house several times, hit her once and threatened to kill her on another occasion.

Carlton Lewis denied ever striking his wife, but added: "If it would have been any other man there, she would have had her butt kicked several times."

Carlton Lewis said the marriage fell apart because his wife refused to clean house, cook him dinner or do any-

thing. She said she accepts half the blame for their troubles, but thinks he also must accept responsibility.

He finally moved out last November, and she filed for divorce Jan. 20. She became pregnant July 7 when a spermicide she used failed during a brief attempt at reconciliation.

When he discovered she was pregnant, he went to court to bar her from having an abortion. The Michigan Court of Appeals lifted the injunction and the case was appealed until the U.S. Supreme Court refused to consider it on an emergency basis.

TUESDAY, Shawn Lewis said she is no longer afraid her husband will hurt her, but only hopes they can some day be friends again.

"I hope so. We have a son. So we have to try," she said. Carlton Lewis said he is just hoping that those in the public who believe he was right in fighting to see his child born will help him pay his bills.

"It would be nice. I would appreciate the help," he said.

FILED
NOV 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3) (3)

Nos. 88-555, 88-683

IN THE

Supreme Court of the United States

October Term, 1988

GENE MYERS, Guardian Ad Litem, *Petitioner*,

v.

SHAWN KATHLEEN LEWIS, *Respondent*,

CARLTON JAMES LEWIS, *Petitioner*,

v.

SHAWN KATHLEEN LEWIS, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITIONER'S JOINT REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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November 14, 1988

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. RESPONDENT'S BRIEF IS PREMISED UPON THREE FUNDAMENTAL ERRORS CONCERNING THE NATURE OF APPELLATE PRACTICE 2

A. Respondent May Not Raise Issues Before This Court Not Raised in the Michigan Court of Appeals 2

B. Respondent May Not Assert Allegations Outside the Record to Overturn Factual Findings of the Trial Court Below 3

C. Respondent May Not Assert Independent State Grounds Not Relied Upon in the Lower Appellate Court by Claiming that the State Has Not Recognized an Interest in Unborn Human Life and that Petitioner Myers Has No Standing Under State Law 5

II. RESPONDENT EMPLOYS A FLAWED CONSTITUTIONAL ANALYSIS 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases: *Page*

Creswell v. Knights of Pythias, 225 U.S. 246 (1912) 4

Doe v. Bolton, 410 U.S. 179 (1973) 6,9

Fiske v. Kansas, 274 U.S. 380 (1927) 4

Grayson v. Harris, 267 U.S. 352 (1925) 4

Merchant's National Bank v. Richmond, 256 U.S. 635 (1921) 6

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 2,8-9

Roe v. Wade, 410 U.S. 113 (1973) 2,6, 8-9

Treatises

Stern, Gressman & Shapiro, *Supreme Court Practice*, (6th ed. 1986) 4

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ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITIONER'S JOINT REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioners Gene Myers and Carlton James Lewis submit this Joint Reply, pursuant to Sp. Ct. R. 22.5, to arguments first raised in Respondent's Brief in Opposition to petitions for certiorari numbered 88-555 and 88-683.

Respondent's Brief in Opposition is flawed in its approach to appellate practice before this Court. Three fundamental flaws underly her Brief: (1) that issues not raised below may now be raised, (2) that this Court will disregard the factual findings of

the trial court against the Respondent below, based on allegations outside the record, and (3) that independent state grounds may be asserted where the lower court did not employ them. Further errors flow from this attempted misuse of the appellate process. These are aggravated by use of the wrong constitutional analysis.[1]

To deny the petitions for certiorari herein, based upon Respondent's efforts to blur the clear-cut issues and factual findings, would reward such practices and encourage their use. In reality, the issues herein are very simple and their importance favors the granting of both petitions.

I. RESPONDENT'S BRIEF IS PREMISED UPON THREE FUNDAMENTAL ERRORS CONCERNING THE NATURE OF APPELLATE PRACTICE.

A. RESPONDENT MAY NOT RAISE ISSUES BEFORE THIS COURT NOT RAISED IN THE MICHIGAN COURT OF APPEALS.

Respondent believes she may raise issues before this Court which were neither raised nor passed upon by the Michigan Court of Appeals. She does this by seeking to challenge the facts found by the trial court, by arguing standing under state statutes, and by asserting independent state grounds for the decision.

The Michigan Court of Appeals held simply that the injunction at issue was to be "dissolved, because it interfere[d] with plaintiff's constitutional rights as set forth by the United States Supreme Court in *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*." Myers' Appendix at 3a (citations omitted).

The issue framed by this holding is simple: whether *Roe* and *Danforth* precluded the action of the trial court, under the facts

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[1] Respondent further tries to persuade this Court by waging a war of words. Respondent's repeated use of such terms as "entirely frivolous," "absurd," "complete distortion," and "grossly misrepresents" adds heat but little light to the analysis. *See, e.g.*, Respondent's Brief at 10, 11, 12, 13, 18, 26.

as found by that court. No challenge to the facts found by the trial court was considered. No question of standing under state law was discussed. No independent state grounds were mentioned. These issues are not properly before this Court.

B. RESPONDENT MAY NOT ASSERT ALLEGATIONS OUTSIDE THE RECORD TO OVERTURN FACTUAL FINDINGS OF THE TRIAL COURT BELOW.

In this case, although no challenge was made in the lower courts to the sufficiency of the evidence to support the findings and judgment of the trial court, and although the Michigan Court of Appeals did not consider that issue (but relied wholly on federal constitutional law), the Respondent now seeks to challenge the findings of the trial court. Brief in Opposition at 3-16. Moreover, Respondent seeks a consideration of allegations beyond the record of this case. Thereby, Respondent asks this Court to sit as a trial court, weighing competing assertions of new evidence.

The trial court found, in its Statement of Facts, that "it was determined that in fact there was no such medical documentation [of the medical need for an abortion, as asserted by Respondent] and the doctor in fact said that it was specifically a social decision as opposed to a medical decision to terminate the pregnancy." Myers' Appendix at 8a. The clear implication of this finding is that her attending physician determined that there was no medical indication for the abortion sought.

Respondent now wants to avoid this finding by filing affidavits in this court. She alleges that Dr. Stoker was not really Respondent's physician and that he really did say that she had medical indications for an abortion. Such an effort to counter the findings of a trial court with allegations outside the record (and, therefore, not subject to the usual requirements of evidence, such as a proper foundation and cross-examination of witnesses, with affidavits in the United States Supreme Court is improper. By failing to raise her challenge to the factual

findings of the trial court by specifying it as an issue on appeal before the Michigan Court of Appeals, Respondent has waived this issue.

Moreover, where the facts of a case are properly before this Court, it will only reconsider the state court's findings of facts in a limited set of circumstances. *See, e.g.*, Stern, Gressman & Shapiro, *Supreme Court Practice* 185-87 (6th ed. 1986) (listing the situations in which this Court has examined the facts of a case). This set of circumstances may be distilled into two major exceptions to the rule that "[t]he Supreme Court will not exert its jurisdiction merely to review a decision of a state court upon a question of fact. And once a case is otherwise before it, the Court generally will not reexamine the state court's findings and conclusions of fact." *Id.* at 185 (citing, *inter alia*, *Grayson v. Harris*, 267 U.S. 352, 358 (1925)).

First, this Court will review a state court's findings "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it." *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927). In the present case, there is evidence to support the finding of fact of the trial court.

Second, this Court will review state court findings of fact "where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass on the Federal question, to analyze the facts." *Id.* While this second exception may apply in the instant case, it is clear that analysis of the facts legitimately in evidence supports the issuance of the injunction by the trial court, if *Roe* does not preclude such action. Thus, the true issue is one of constitutional law and not one of fact.

While this Court has the freedom to make an independent determination of the facts, *Creswill v. Knights of Pythias*, 225 U.S. 246, 262 (1912), Respondent seeks to have this Court deny the petitions for certiorari herein on the basis of a *de novo* hearing on allegations outside the record. Because a *de novo* hearing is beyond anything approved by this Court, the

request for it serves as no basis on which to deny the writs sought herein.

C. RESPONDENT MAY NOT ASSERT INDEPENDENT STATE GROUNDS NOT RELIED UPON IN THE LOWER APPELLATE COURTS BY CLAIMING THAT THE STATE HAS NOT RECOGNIZED AN INTEREST IN UNBORN HUMAN LIFE AND THAT PETITIONER MYERS HAS NO STANDING UNDER STATE LAW.

Respondent declares that the State of Michigan has not asserted its interest in unborn human life. Brief in Opposition at 23-26.[2] This argument fails the test of logic. If, indeed, there is state action herein, as the Respondent insists, then the state must have acted through the trial court. The notion that the trial court cannot base its decision on a state interest recognized in Michigan law,[3] but that the state of Michigan must assert that interest by statute or by acting as a party, is erroneous. Michigan law has recognized an interest in protecting fetal life by statute and prior court opinion, upon which the trial court could base its opinion.[4] Finally, whether Michigan has recognized an interest in protecting fetal and paternal rights is a matter of state law, which, if unclear, should be decided by the state courts on remand, after this Court corrects the error of law that *Roe* and its progeny preclude the action of the trial court herein. *Cf. Merchant's National Bank v. Richmond*, 256 U.S. 635, 638 (1921) (Court corrected the

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[2] In addition to the flaws noted *infra*, this issue was not timely raised in the court of appeals and is, therefore, waived on appeal.

[3] *See* Myers Petition at 14-15 for the clear statement of Michigan public policy on abortion by the Michigan Supreme Court, which declared it the public policy of Michigan to oppose abortion except to save the life of the mother.

[4] *Id.* Moreover, the referendum to overrule the legislature and allow public funding of abortion in Michigan, upon which Respondent relies to cast doubt on the public policy of Michigan, Brief in Opposition at 26 & n.17, was resoundingly defeated in the election of November 8, 1988. Michigan forcefully rejected public funding of abortion.

error of constitutional law but left open a question of fact to be decided by the state court on remand).

Likewise, whether Petitioner Myers has standing under the Michigan guardian ad litem statute is a matter of state law, not relied upon by the Michigan Court of Appeals in striking down the injunction of the trial court. Brief in Opposition at 1 & n. 1.

II. RESPONDENT EMPLOYS A FLAWED CONSTITUTIONAL ANALYSIS.

Respondent argues that "Petitioners' failure to assert a compelling state interest is fatal because a compelling interest is essential to justify any state interference with Ms. Lewis' abortion decision." Brief in Opposition at 16. Respondent misunderstands the argument. Petitioners argue that this Court has never recognized a fundamental right to a non-medically indicated abortion. Because the trial court found that there is no medical indication for the abortion sought herein, there is no fundamental right. Therefore, no compelling state interest need be shown.

Further, Respondent would make of the abortion right an absolute right of a woman to "control her body." *Id.* at 12. This radical autonomy model of the abortion liberty clouds Respondent's perception of the analysis herein, but it was expressly rejected by this Court in *Roe*. 410 U.S. at 154. This Court also expressly rejected abortion on demand, the corollary of such a model. *Doe v. Bolton*, 410 U.S. 179, 189 (1973). Thus, Respondent's representation of the abortion liberty as an absolute right, excluding the consideration of all competing interests, is erroneous.

Nor did *Roe* forever eliminate the standing of guardians ad litem representing the interests of unborn children. Respondent attempts a sleight of hand by claiming that the Guardian Ad Litem herein is asserting the "right to life" of Unborn Child Lewis, and, therefore, he has no standing, because Unborn Child Lewis is not a "person" within the meaning of the Fourteenth Amendment. Brief in Opposition at 1-3. This error also flows from a misunderstanding of the analysis.

Petitioner Myers is not asserting the "right to life" of Unborn Child Lewis. Therefore, Respondent's discussion of personhood is superfluous. Rather, Petitioners defend the action of the Michigan trial court on the basis that it had a legitimate, constitutionally permissible state purpose in protecting fetal life and in encouraging childbirth over abortion — derivable from, *inter alia*, its parens patriae power and its institutional self-interest, not the Fourteenth Amendment — to which the trial court's action of enjoining a non-medically indicated abortion was rationally related. Because the interests in fetal life find their source in places other than the Fourteenth Amendment, what the Court has held concerning the personhood of Unborn Child Lewis under the Fourteenth Amendment is wholly irrelevant.[5]

Respondent also argues that an abortion is always medically indicated because "abortion, particularly early abortion, is safer than continued pregnancy and child birth." Brief in Opposition at 13 & n.8. Respondent argues that this is "always" so "in the first trimester," because "*Roe* implicitly recognized" that abortion was always safer in the first trimester than carrying the unborn child to term. *Id.*

While initially appealing, this argument is erroneous. First, it makes this Court's discussions of medical judgment and medical necessity irrelevant surplusage. *See* Myers' Petition at 8-12 (citing numerous references by this Court to a requirement of medical necessity for the well-being of the mother, including appropriate sanctions for physicians who violated that standard). Finally, as noted above, this Court has rejected

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[5] Likewise, as Petitioners defend state action that has already occurred, based on a satisfaction of the rational basis test, the assertion that a woman can obtain an abortion without state action and, thus, there can be no federal remedy, is irrelevant as well. Brief in Opposition at 18. This flawed analysis flows from a fundamental misunderstanding of the theory by Respondent. While state action might be required for Petitioners to assert a Fourteenth Amendment *right* to a consideration of their interest, it is not required where they, as here, assert that the state had a rational basis for pursuing the protection of their interests by injunction — a legitimate, constitutionally permissible purpose.

abortion on demand, even in the first trimester. If there were always medical indications for an abortion, as alleged by Respondent, then this Court would have approved abortion on demand.

In sum, the Respondent has misunderstood the analysis employed by this Court in the abortion cases. As the analysis of Respondent is flawed, it serves as no basis to deny the petitions for certiorari sought herein.

CONCLUSION

The issue herein is simple: whether *Roe* and *Danforth* precluded the trial court from issuing an injunction to protect fetal and paternal interests where the attending physician has found that there is no medical indication for the abortion sought. In simpler terms, it is whether this Court recognizes abortion on demand.

Respondent seeks to change the case by attempting to overturn factual findings of the trial court by asserting new allegations of fact on appeal. If she was dissatisfied with the statement of Dr. Stoker, it was her duty in the trial court to find another physician. If she believed Dr. Stoker was the wrong physician, it was her duty in the trial court to bring in the right one, or, at least, submit her evidence of the error to the fact finder. If she believed the fact finder was in error as to those facts, it was her duty to appeal those claimed factual errors to the Michigan Court of Appeals. Instead, she proceeded with her federal question, accepting the findings of the trial court.

Respondent won on her federal question. The Michigan Court of Appeals decided the appeal solely on the basis of the federal question.

Now Respondent seeks to muddy the crystal clarity of this case by asking this Court to relitigate the facts and by raising issues not passed upon below. Affidavits alleging factual errors on appeal to this Court cannot defeat the factual finding of a trial court. This Court should reject such practices and not encourage them by denying certiorari on such a basis.

This Court needs only to correct the misreading of *Roe* and *Danforth* by the Michigan Court of Appeals, which found those cases to countenance abortion on demand, even where the only evidence in this case is that the woman's physician has decided that the abortion sought is for purely non-medical reasons, and where the finder of fact has so found, even employing the broad definition of health in *Bolton*. All other matters of which Respondent complains have either been waived or should be resolved by the Michigan courts. This Court should take this case to clarify the plain misunderstanding of its holdings in two cases critical to a matter of great public importance, the regulation of abortion. The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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